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A

PRACTICAL TREATISE

OF

The Law

OF

VENDORS AND PURCHASERS

OF

CHATTELS PERSONAL.

BY

T. C. MORTON, ESQ.,

OF LINCOLN'S INN.



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- II. RIGHTS AND LIABILITIES OF THE PARTIES.
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      - Partners of vendor.
      - Bailees.
      - Agents.

The Law
OF
VENDORS AND PURCHASERS
OF
CHATTELS.

BOOK I.
OF THE CONTRACT OF SALE.

CHAPTER I.
PRELIMINARY CHAPTER.

SALE is defined to be the transfer of the property from the owner to some other person, in consideration of a price or equivalent recompence (*a*). There is no essential distinction between sale, and barter or exchange; in the former, the consideration is money; in the latter, any valuable commodity (*b*). The law is the same whatever be the *quid pro quo;* but a consideration of some kind is absolutely necessary, for the maxim is, *ex nudo pacto non oritur actio* (*c*). Definition of sale. Barter.

The first consideration naturally is, what persons are qualified in law to become parties to a con- Parties to sale.

(*a*) See 2 Bl. Comm. ch. 30; 2 Wooddeson's Lect. p. 210.

(*b*) 2 Bl. Comm. ch. 30.

(*c*) Noy's Max. p. 348 (9th Ed.) *Irons* v. *Smallpiece*, 2 B. & A. 551; *Bunn* v. *Markham*, 2 Marsh. 532.

tract of sale. The general rule is, that all are to be presumed competent unless proved to be affected by some express disability (*d*). Persons under the age of twenty-one years (*e*), which is the legal age of discretion, are not held responsible for civil contracts into which they may enter; but as this very disability is a privilege allowed by the indulgence of the law, in order that advantage may not be taken of the inexperience of youth (*f*), an exception is made in the case of necessaries suitable to the fortune and condition of the infant. The privilege is personal; none therefore, can avail themselves of it, but the infant himself, and on the principle that the privilege ought (as it has been expressed) to be regarded rather as a shield than a sword, most contracts entered into by an infant, are held to be, not absolutely void, but voidable only, and may therefore be ratified on attaining full age. Married women (*g*) are under a similar disability of binding themselves (or their husbands) by contract, unless it be for necessaries, or unless the authority of the husband has been given either expressly or by implication; and the general rule holds equally where the husband and wife live together, as where

Disabilities.

Infancy.

Coverture.

(*d*) Of Disability, see Book I. Chap. ii.
(*e*) Of Infancy, see Book I. Chap. ii. Sect. 1.
(*f*) 1 Bl. Comm. ch. 17; Co. Litt. 171, b.
(*g*) Of Coverture, see Book I. Chap. ii. Sect. 2.

they have been separated, whether by the act of either party, by mutual consent, or by the sentence of a Spiritual Court. Idiots and lunatics may bind themselves for necessaries (*h*): and in general the Courts will not interfere to set aside a contract entered into by one who is *non compos*, if it appear, that no contrivance or imposition has been practised by the plaintiff, and that no prejudice has resulted to the defendant, from his mental imbecility (*i*). Persons attainted of felony forfeit all their property to the crown, and are consequently disabled to contract from the period of conviction (*k*). Lastly, Alien enemies are incapacitated from suing in any Court of this realm, and cannot, therefore, during the continuance of hostilities, enforce a contract, even if entered into before the commencement of the war (*l*).

Idiocy and Lunacy.

Attainder.

Alien enemy.

In the sale or barter of personal property, no formal mode of transfer is prescribed by law, whether the sale be by private contract or by public auction (*m*). The technical niceties, and the instruments of conveyance, which are requisite in the graver matters of alienation of real property, would be cumbersome and useless in the every-day transactions of buying and selling goods.

Mode of transfer.

(*h*) Of Idiocy and Lunacy, see Book I. Chap. ii. Sect. 3.

(*i*) *Baxter* v. *Portsmouth* (*Earl*), 5 B. & C., 170.

(*k*) Of Attainder, see Book I. Chap. ii. Sect. 4.

(*l*) Of Alien Enemy, see Book I. Chap. ii. Sect. 5.

(*m*) Of Sales by Auction, see Book I. Chap. v.

When written evidence necessary.

But in order to prevent frauds and perjuries, the legislature has wisely provided, that where the consideration exceeds a certain value, no executory contract of sale shall be deemed binding, on oral evidence only (*n*); no strict form, however, is required, but merely a simple memorandum in writing of the bargain; and this written agreement is expressly exempted from the usual agreement-stamp. Written evidence is unnecessary where any overt act has been done, from which a permutation of the property can be inferred; such alteration of the property may arise, either from an actual or constructive delivery of the possession, or from a payment of part of the price, or from something being given by the buyer by way of earnest as a symbol of his ratification of the contract.

Sale of Ships.

In the sale, however, of one species of chattels, viz. ships, other formalities are requisite (*o*). On account of the importance and value of the property, and the uncertainty which would otherwise prevail as to ownership, the legislature has provided that the property in ships shall not be transferred without certain instruments in writing.

What avoids a sale.

To constitute a valid contract of sale, the parties must act *bonâ fide*, and according to law.

(*n*) 29 Car. II. c. 3. s. 17. See Book I. Chap. iii. Part 1.
(*o*) 3 & 4 Will. IV. c. 55. See Book I. Chap. iii. Part 2.

Fraud.

It is a general rule, that Fraud (*p*) vitiates every transaction. Therefore, if the vendor be guilty of fraud against the vendee, or the vendee against the vendor, the innocent party in either case will not be compelled to complete the contract. In like manner, where the contract is fraudulent, (whether by statute (*q*) or at common law (*r*)) against third persons, it cannot be enforced. A strong badge of fraud, though not conclusive evidence, is afforded by the circumstance of the vendor continuing in possession after the sale; since, in ordinary dealings a change of possession accompanies a change of property, and by deviating from this rule, third parties are deceived, and induced to give credit to the apparent owner (*s*).

Immorality.

Immorality (*t*) is another ground of avoiding a contract of sale. No contract arising out of an immoral transaction can be enforced; for the maxim of law is, *ex turpi causâ non oritur actio*, or, in the elegant paraphrase of Lord Mansfield "Justice must be drawn from pure fountains" (*u*).

Illegality.

Illegality is also a ground of avoidance. If the contract violate any rule of law, whether common

(*p*) Of Fraud, see Book I. Chap. iv. Sect. 1.
(*q*) 13 Eliz. c. 5. See Book I. Chap. iii. Part 5.
(*r*) See Book I. Chap. iv. Sect. 1. 3.
(*s*) 2 Stark. Evid. p. 359 (2nd Ed).
(*t*) Of Immorality, see Book I. Chap. iv. Sect. 2.
(*u*) Selw. N. P. p. 70 (8th Ed).

law or statute, or the principles of public policy, the sale is null and void. On this principle, contracts for the sale of illegal shares, gambling contracts, and all contracts arising out of illegal trading transactions carried on with the subjects of a country at war with Great Britain, are void (*x*). On the same principle, sales of prohibited goods and chattels (*y*), and contracts entered into on prohibited days (*z*), cannot be enforced. Under this head too, may be classed contracts affected by the Acts of Bankruptcy (*a*). Even before any act of bankruptcy committed, a transfer by a trader in contemplation of bankruptcy, and in order to give a fraudulent preference to a particular creditor, is void. After an act of bankruptcy committed, no dealings whatever with the bankrupt can be supported, unless they are expressly protected by the saving clauses of the statute, which provide in certain cases that the fair trader shall not be prejudiced by secret acts of which he has no notice.

Of change of property by sale.

A complete and *bonâ fide* sale, in general transfers the property absolutely from the vendor to the vendee: but from the rule of law, that no one can assign a greater interest in any thing than he him-

(*x*) Of Illegality at Common Law, See Bk. I. Chap. iv. Sect. 3.

(*y*) See Book I. Chap. iii. Part 3.

(*z*) 29 Car. II. c. 7. s. 1; see Book I. Chap. iii. Part 4; *Dies dominicus non est juridicus.*—Noy's Max. p. 2.

(*a*) 6 Geo. IV. c. 16; see Book I. Chap. iii. Part 6.

self possesses (*b*), it follows that no sale would, under any circumstances, have the effect of divesting the property from the true owner, where the title of the vendor has been wrongfully acquired. For the security, however, of innocent purchasers, this rule is confined to private and secret sales; and however wrongful or illegal may have been the title of the vendor, the property, by a sale for valuable consideration in market overt (*c*), is absolutely altered, and the vendee acquires a title which is good against the whole world. But an exception is made in one species of chattel, to wit, horses, because (saith Blackstone) a horse is so fleet an animal that the stealers of them may fly far off in a short space, and be out of reach of the most industrious owner (*d*). Therefore, to change the property in a horse against the owner, not only must the sale be in market overt, but certain formalities prescribed by statute (*e*) must be strictly adopted.

Sale in market overt.

Sale of horses.

An important division of the law of sale relates to the reciprocal rights, duties, and liabilities of the vendor and purchaser, and the remedies provided by law to enforce those rights.

Reciprocal rights and liabilities of parties.

(*b*) *Nemo potest plus juris ad alium transferre quàm in ipso est.* Noy's Max. p. 339, (9th Ed.)

(*c*) Of Sale in Market Overt, see Book I. Chap. vi.

(*d*) 2 Comm. ch. 30. 2 Inst. 714.

(*e*) 2 Ph. & Mar. c. 7; 31 Eliz. c. 12. See Book I. Chap. vi. Sect. 2.

Extra-judicial remedies of vendor.

After the bargain of sale has been completed, but before the price has been paid, or the possession of the goods has been parted with, the vendor

Lien.

possesses the extrajudicial right of Lien, i. e. the right of retaining the goods as a security for the price (*f*). Even after the possession is lost by the vendor, while the property, not being absolutely vested in the purchaser, remains *in transitu*, a species of contingent lien continues. The vendor is entitled to exercise this right (technically termed

Stoppage in transitu.

Stoppage *in transitu*), and to resume possession of the goods, in cases where the intermediate bankruptcy or insolvency of the purchaser deprives him of the reasonable chance of obtaining payment (*g*).

Judicial remedies of vendor.

When the contract of sale between the parties is concluded, if the purchaser departs from his engagement, and refuses to accept the goods, the

Assumpsit for not accepting.

vendor may maintain an action of Assumpsit (*h*) on the special contract for not accepting. Or, if the property has been transferred to the purchaser, and the price has not been paid, the vendor may

Assumpsit for goods sold.

bring assumpsit (or debt) for goods bargained and sold, or for goods sold and delivered.

Rights of vendee.

On the other hand, where default is made on the part of the vendor, the vendee has certain

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(*f*) Of Lien, see Book II. Part 1. Chap. i.

(*g*) Of Stoppage *in transitu*, see Book II. Part 1. Chap. ii.

(*h*) Of Assumpsit by vendor, see Book II. Part 1. Chap. iii.

remedies to compel performance of the agreement. When the contract has been legally entered into, and the price duly paid or tendered, if the vendor refuses to deliver the goods, the purchaser may sue in Assumpsit on the special contract for not delivering (*i*). Or if the property and right of possession have vested in the purchaser, although the actual possession may remain in the seller, an action of Trover (*k*) for the goods may be supported.

Assumpsit for not delivering.

Trover.

Further, after the contract is finally concluded, by the delivery on one side and payment on the other, a cause of action may arise against the vendor, on the ground of a breach of Warranty (*l*) of the goods. In general this action must be founded on express warranty. The Civil law, in this respect, was much more favourable to purchasers than the English law; their rule being that the vendor was bound to warrant the subject-matter of the sale against all defects, whether he were cognizant of them or not (*m*); and moral writers have urged, that the seller is bound *in foro conscientiæ* to make known to the purchaser the defects with which he is himself acquainted (*n*).

Action of warranty.

(*i*) Of Assumpsit by vendee, see Book II. Part 2. Chap. i.

(*k*) Of Trover by vendee, see Book II. Part 2. Chap. ii.

(*l*) Of action on Warranty, see Book II. Part 2. Chap. iii.

(*m*) "*Certiores faciant emptores quid morbi vitiive cuique sit.*" D. lib. xxi. t. 1. l. i. §. 1.

(*n*) See 1 Poth. Obl. p. 7. Paley Mor. Phil. vol. i. b. 3 c. vii. Grotius, l. ii. c. xii. s. 9. Cic. de Off. lib. iii. 13.

Maxim *caveat emptor.*

With us, nevertheless, the maxim "*caveat emptor*" is more generally applicable. If the purchaser act so improvidently, as to neglect taking the necessary precautions for ascertaining the quality of the goods which he bargains for, he must pay the penalty of his negligence; for the ancient maxim of law is "*vigilantibus, non dormientibus leges subveniunt.*" And mere vague expressions which are usual to sellers, who praise at random the goods which they are desirous to dispose of, will not amount to a warranty (*o*). If the vendor, however, expressly undertakes, at the time of the sale, that the quality of the goods shall accord with the description given, or with a sample exhibited, he will be bound by his undertaking. Yet if the purchaser himself was aware of the defects, he cannot afterwards take advantage of them; on the principle of the maxim "*scientia utrinque par pares facit contrahentes*" (*p*). It must be observed that the maxim "*caveat emptor*" is never to be understood as applying to cases of actual fraud; for even where a commodity is expressly sold *with all faults*, this will not protect the vendor, if it can be proved that there were any latent defects which he used artifice and contrivance to conceal (*q*).

Collateral rights and

THE collateral rights and liabilities of vendor

(*o*) Sugd. Vend. p. 3. "*Simplex commendatio non obligat.*"
(*p*) Sugd. Vend. p. 1.
(*q*) *Baglehole* v. *Walters*, 3 Campb. 154.

and purchaser are scarcely less important than their mutual obligations. Liabilities of the parties.

Partners (*r*) are liable in general for all engagements entered into by their co-partners; or, as Lord *Kenyon* has broadly expressed it, "one partner may pledge the credit of the firm to any extent." The rule holds equally in the case of general trading partnerships, as in cases where the parties have held themselves out as partners in a particular transaction. No private understanding, or express arrangement, among the partners themselves, limiting or qualifying the extent of their liability, can avail them in respect of third persons without notice (*s*). Therefore, partners in name (although not really interested), and partners in interest (although dormant or secret), are involved in a common liability. Partners.

The rights of vendor against Sureties (*t*), or third persons entering into a collateral undertaking to guarantee payment of the price by the purchaser, forms an important subject of consideration. The claim against a surety is said to be *strictissimi juris* (*u*); and accordingly, to establish his liability on the vendee's default, the plaintiff must prove a Sureties.

(*r*) Of Vendee's Partners, see Book II. Part 3. Chap. i. Of Vendor's Partners, see Book II. Part 4. Chap. i.

(*s*) *Waugh* v. *Carver*, 2 H. Bl. 235.

(*t*) Of Sureties, see Book II. Part 3. Chap. ii.

(*u*) *Per* Lord *Ellenborough*, C. J., *Bacon* v. *Chesney*, 1 Stark. N. P. C. 193.

strict compliance with the terms of the guaranty. By the statute of frauds, every "special promise to answer for the debt, default or miscarriage, of another person," must be in writing and signed by the party to be charged, or his authorized agent (*x*).

Bailees. The rights and liabilities of Bailees (*y*) require a certain degree of consideration. In general, as soon as goods sold have been delivered into the custody of a carrier, wharfinger, or other bailee, on the account of the consignee, the vendor's interest in the property (except indeed his contingent right of stopping *in transitu*) is wholly determined; the property vests in the purchaser, and remains thenceforward at his risk (*z*). Accordingly, the action against the bailee ought to be brought in the name and on the behalf of the purchaser (*a*). Yet, it must be observed that, under certain circumstances, either the vendor or the purchaser indiscriminately may be made plaintiff against the bailee, and in one or two special cases, where the consignee has acquired no interest in the property, the vendor is the only party who can maintain the action (*b*).

Agents. Lastly, the law of Principal and Agent is involved

(*x*) 29 Car. II. c. 3. s. 4.
(*y*) Of Bailees, see Book II. Part 4. Chap. ii.
(*z*) *Greaves* v. *Hepke*, 2 B. & A. 131; Bull. N. P. 36.
(*a*) *Fragano* v. *Long*, 4 B. & C. 219.
(*b*) See 1 Chit. Pl. p. 2.—*Post.*

in a twofold view in reference to vendors and purchasers:—First, in respect of the extent to which the acts of their agents make the principals liable to each other: — Secondly, in respect of the mutual rights and liabilities of agent and principal (*c*).

(*c*) Of Vendor and Agent, see Book II. Part 3. Chap. iii. Of Vendee and Agent, see Book II. Part 4. Chap. iii.

CHAPTER II.

OF THE EFFECT OF DISABILITY OF THE PARTIES UPON CONTRACTS OF SALE.

Disability to contract.

If either the vendor or vendee, at the time of sale, be under a disability in law to contract, the contract will be either absolutely void, or voidable by the party affected by such disability. The different causes of disability may be classed under the following heads:—I. Infancy. II. Coverture. III. Lunacy. IV. Attainder. V. Alien enemy.

Section I.—Infancy.

Generally infant is not liable on contract.

The general rule of law is, that any contract entered into before the party attains the full age of twenty-one is not binding (*a*). Full age is attained on the day preceding the anniversary of the birth-day; thus, a person born on the first day of January, is of age to do any legal act on the morning of the last day of December, though he may not have lived twenty-one years by nearly forty-eight hours; the reason assigned is, that in law there is no fraction of a day (*b*). If goods, contracted

(*a*) 1 Bl. Comm. 463; Bull. N. P. 154; Co. Litt. 171. b.

(*b*) 1 Bl. Comm. 463. (See note of Professor Christian.) *Anon.* 1 Salk. 44, *per Holt*, C. J.

to be sold, be delivered to a carrier a few days before the purchaser is of age, although they do not reach the purchaser until after he has attained twenty-one, there is no binding contract, for the property vests on the delivery to the carrier (*c*).

Although an infant is liable for *torts* in general (*d*), the plaintiff will not be permitted to bar the defendant of his plea of infancy, by converting into a tort the subject matter of an action which clearly arises out of a contract (*e*). An infant bailee is not liable for negligence (*f*), nor an infant vendor for a breach of warranty in the sale (*g*), or exchange (*h*), of a chattel.

An exception to the rule of non-liability is made in the case of *necessaries* (*i*) supplied to an infant vendee. And in almost all cases a ratification of the contract upon attaining full age will make it valid and effectual (*j*); because, in general, the

Exceptions.

(*c*) *Griffin* v. *Langfield*, 3 Campb. 255.—*Post*.

(*d*) *Bristow* v. *Eastman*, 1 Esp. 172.

(*e*) See 8 T. R. 337; *Grove* v. *Nevill*, 1 Keb. 778.

(*f*) *Jennings* v. *Rundall*, 8 T. R. 335.

(*g*) *Howlett* v. *Haswell*, 4 Campb. 118.

(*h*) *Green* v. *Greenbank*, 2 Marsh. 485. Nor can an infant be sued in an action for deceit in falsely stating that he was of full age.—*Johnson* v. *Pie*, Siderf. 258.

(*i*) In *Brook* v. *Galley*, 2 Atk. 34, Lord *Hardwicke*, Ch. said, "The law lays infants under a disability of contracting debts except for *bare necessaries*, and even this exemption is merely to prevent them from perishing." But see *Zouch* v. *Parsons*, 3 Burr. 1801, Judgment of Lord *Mansfield*, C. J.

(*j*) *Southerton* v. *Whitelocke*, 1 Str. 690.

acts of an infant are not void but voidable only(*k*): for if an infant sell goods and deliver them, action of trespass will not lie against the vendee (*l*): so if he bail goods to his own use, trespass will not lie against the bailee (*m*).

The contract not void but voidable.

On the principle, that the contract in general is not void but voidable by the infant himself, and by him only, since the privilege is personal (*n*), it follows, that the infancy of the vendee is no defence, in favour of the vendor, in an action brought against the latter for the non-performance of the contract. The infant may enforce the contract at his option, though he himself is not bound thereby (*o*).

The question of the liability of an infant on his contracts may be considered under the following heads:—

What are held to be necessaries.

What are held not to be necessaries.

Of ratification on attaining full age.

What are necessaries.

1. *What are held to be necessaries.* An infant may bind himself to pay for his necessary meat,

(*k*) Co. Litt. 2 b.

(*l*) Per *Hyde* J. 1 Mod. 137.

(*m*) 1 Rol. Abr. 730, l. 20; Com. Dig. *Enfant*, C. 3.

(*n*) *Taylor* v. *Croker*, 4 Esp. 187; *Jones* v. *Darch*, 4 Price, 300; *Smith* v. *Bowen*, 1 Mod. 25; see 1 Show. 171.

(*o*) *Bruce* v. *Warwick* (in error), 6 Taunt. 118; S. C. 2 M. & S. 205; *Fitzmaurice* v. *Waugh*, 3 D. & R. 273; *Keane* v. *Boycott*, 2 H. Bl. 511; *Holt* v. *Ward*, 2 Str. 937; see Bac. Abr. *Infancy*, I. 4.

drink, apparel, physic, and likewise for his good teaching and instruction (*p*). The question of necessaries is a relative fact, to be governed by the fortune or circumstances of the infant, and proof of these circumstances lies on the plaintiff(*q*). They ought to correspond with the real circumstances, and not the mere appearance in life, of the infant (*r*). The question is usually one of fact for the Jury, but their verdict is subject to the control of the court in point of law (*s*). It has been held that unless the question is exclusively one of law, if any of the articles furnished to the defendant fall within the description of necessaries, the evidence ought to be left to the Jury (*t*).

The defendant, being a Captain in the army, was held to be liable for livery furnished for his servant;—Lord Kenyon, C. J. observed, that he could not say it was not necessary for a gentleman in defendant's situation to have a servant, and if it were proper, it was equally necessary that the servant should have a livery (*u*). So an infant is liable for the cost of a suit of regimentals for a

(*p*) Co. Litt. 172, a. Com. Dig. *Enfant*, B. 5; Bac. Abr. *Infancy*, I. 1.; Vin. Abr. *Enfant*, C.; *Huggins* v. *Wiseman*, Carth. 110; *Pickering* v. *Gunning*, Palm. 528; Jones, 182; March, 40.

(*q*) Per Lord *Kenyon*, C. J., 1 Esp. 211; Rosc. Ev. p. 245.

(*r*) *Ford* v. *Fothergill*, 1 Esp. 211; S. C. Peake, 229.

(*s*) 2 Stark. Ev. 406; *Makarell* v. *Bachelor*, Cro. Eliz. 583.

(*t*) *Maddox* v. *Miller*, 1 M. & S. 738; *Bliss* v. *Palmer*, Peake, 303, n. (3rd ed.).

(*u*) *Hands* v. *Slaney*, 8 T. R. 578.

volunteer corps of which he is a member (*v*). An infant is liable for necessaries supplied for his wife (*w*), or for his child (*x*), or if he be a housekeeper, for victuals supplied for his household (*y*).

What are not necessaries.

2. *What are held not to be necessaries.* An infant captain in the army was held not to be liable for cockades ordered for the soldiers of his company (*z*); and a lieutenant in the navy, not in commission at the time, was decided not to be liable for the price of a chronometer sold to him by the plaintiff (*a*). So articles clearly above the rank and station of the infant will not be deemed necessaries; as silk dresses and other expensive articles, for a servant maid (*b*). It must appear that the necessaries were for the infant himself (*c*); therefore a replication to the plea of infancy, that the articles were necessary for the defendant's horses, was adjudged bad, because it was said, *non constat* that the horses were necessary for the infant (*d*).

(*v*) *Coates* v. *Wilson*, 5 Esp. 152.

(*w*) *Turner* v. *Trisby*, 1 Str. 168.

(*x*) Bull. N. P. 155.

(*y*) *Hill* v. *Blackton*, cited 1 Sid. 112; *Tuberville* v. *Whitehouse*, 1 C. & P. 94.

(*z*) *Hands* v. *Slaney*, 8 T. R. 578.

(*a*) *Berolles* v. *Ramsay*, Holt, N. P. C. 77.

(*b*) *Hedgley* v. *Holt*, 4 C. & P. 104. And see *Makarell* v. *Bachelor*, Cro. Eliz. 583; S. C. Gouldsb. 168; *Burghart* v. *Angerstein*, 6 C. & P. 690.

(*c*) *Ive* v. *Chester*, Cro. Jac. 560.

(*d*) *Clowes* v. *Brooke*, Cro. Eliz. 1101; S. C. Andr. 277. But

The vendor will not be entitled to recover even for such articles furnished to an infant as usually fall within the description of necessaries, if they have been supplied in unreasonable quantity, or at extravagant cost (*e*); nor can he recover if he knew, or might have ascertained, that the infant was living at the time with his parent or other relation, and was suitably maintained (*f*). And it seems to be incumbent on the plaintiff in such case to prove, that he had inquired of the parent if the articles ordered by the infant were really wanted (*g*), whether the action be brought against the infant himself, or against his parent or other legal guardian (*h*); but there may be circumstances, from which a jury may infer the assent and authority of the parent (*i*).

Infant cannot trade.

An infant is not bound for goods supplied to him in the way of his trade. Where defendant, being under age, kept a mercer's shop, and bought

in the report in Andrews it is said, that the replication might have been, "physick, &c., for defendant's horses kept for his necessary use."

(*e*) *Simpson* v. *Robertson*, 1 Esp. 17.

(*f*) *Bainbridge* v. *Pickering*, 2 Bl. Rep. 1325; *Story* v. *Pery*, 4 C. & P. 526; *Borinsale* v. *Greville*, Selw. N. P. 128; *Deale* v. *Leave*, Ibid.; *Burghart* v. *Angerstein*, 6 C. & P. 690.

(*g*) *Ford* v. *Fothergill*, Peake 229; *Cook* v. *Deaton*, 3 C. & P. 114.

(*h*) *Blackburn* v. *Mackey*, 1 C. & P. 1; *Fluck* v. *Tollemache*, 1 C. & P. 5; *Crantz* v. *Gill*, 2 Esp. 471; *Rolfe* v. *Abbott*, 6 C. & P. 286.

(*i*) *Baker* v. *Keen*, 2 Stark. N. P. C. 501.

wares of the plaintiff in order to sell them again, it was held that the latter could not recover; even though the infant gain his living thereby; because the policy of the law does not allow an infant to trade (*j*). Therefore an infant cannot become bankrupt, and a commission issued against him would be not voidable merely, but absolutely void (*k*).

The vendor cannot recover against an infant on an account stated (*l*); nor on a bill of exchange or promissory note, though given in payment for necessaries (*m*), unless accepted after he came of age (*n*); nor is he liable for money lent, though it be proved to have been expended in the purchase of necessaries (*o*).

(*j*) *Whittingham* v. *Hill*, Cro. Jac. 494; Dyer 104, b. in mar.; S. P. *Whywall* v. *Champion*, Str. 1083; *Dilk* v. *Keighley*, 2 Esp. 481; *Williams* v. *Harrison*, Carth. 160; *Tuberville* v. *Whitehouse*, 1 C. & P. 94; *Corpe* v. *Overton*, 10 Bingh. 252; S. C. 3 M. & Sc. 738.

(*k*) *Belton* v. *Hodges*, 9 Bingh. 365.

(*l*) *Ingledew* v. *Douglas*, 2 Stark. N. P. C. 36; *Trueman* v. *Hurst*, 1 T. R. 40; *Bartlett* v. *Emery*, 1 T. R. 42, n.

(*m*) *Williamson* v. *Watts*, 1 Campb. 552; *Williams* v. *Harrison*, Carth. 160. But it seems he would be bound by any instrument not negotiable, as a single bill (*Russell* v. *Lee*, 1 Lev. 86), or bond for the exact amount (*Ayliff* v. *Archdale*, Cro. Eliz. 920); and perhaps a promissory note in the hands of the vendor (but not of an indorsee) would be evidence of a debt. See Holt, 78, n. 1 Campb. 553 n.

(*n*) *Stevens* v. *Jackson*, 4 Campb. 164.

(*o*) *Darley* v. *Boucher*, 1 Salk. 279; *Earle* v. *Peale*, 1 Salk. 387; S. C. 10 Mod. 67; *Probart* v. *Knouth*, 2 Esp. 472, n.;

Where an infant is a co-contractor, he ought not to be joined in an action brought against the other; and if the nonjoinder is pleaded, the plaintiff should reply the infancy, which will be no departure (*p*); but if he reply that the contract was with the defendant alone, this will not be supported by proof that the contract was jointly with the infant, since the contracts of an infant are voidable only (*q*). If, in an action brought against several partners or co-contractors, one pleads infancy, the plaintiff cannot enter a *nolle prosequi* as to him, and proceed against the others, but he must discontinue and commence *de novo* against the adult defendants (*r*). If the infant partner does not disaffirm the partnership on attaining full age, he will be liable jointly with the other partners for contracts subsequently entered into (*s*). Infant co-contractor.

3. *Of Ratification on attaining full age.*—To the plea of infancy it is a good replication, that the defendant ratified the promise on coming of Ratification.

Ellis v. *Ellis*, 1 Ld. Raym. 344. [But the infant would be liable in equity if the money has been actually so applied (*Marlow* v. *Pitfield* 1 P. Wms. 558); and an infant has been held liable at law, for money advanced in order to liberate him when taken in execution for necessaries; *Clarke* v. *Leslie*, 5 Esp. 28; *Male* v. *Roberts*, 3 Esp. 163.]

(*p*) *Burgess* v. *Merrill*, 4 Taunt. 468.

(*q*) *Gibbs* v. *Merrill*, 3 Taunt. 307.

(*r*) *Chandler* v. *Parkes*, 3 Esp. 76; *Jaffray* v. *Frebain*, 5 Esp. 47.

(*s*) *Goode* v. *Harrison*, 5 B. & A. 147.

age (*t*). If the plaintiff proves a promise, and the defendant pleads infancy, the proof of such defence rests on the defendant, as it is a fact peculiarly within his knowledge (*u*); but it has always been held, that to charge a person on a contract entered into during infancy, on the ground that the contract has been ratified on attaining majority, an express promise must be proved by the plaintiff; mere acknowledgement, whether implied or expressed, is insufficient (*x*). The subsequent promise must be made voluntarily, not under fear of an arrest and in ignorance that infancy is a discharge of liablity (*y*); and it must be made before action brought (*z*); and by the infant himself, not by his executor after his death (*a*). When there has been a promise to pay part of the debt, it will only bind the infant as far as the promise extends, and no further (*b*). If the

must be express.

(*t*) *Southerton* v. *Whitelocke*, 1 Stra. 690; *Cooper* v. *Martin*, 4 East, 83; *Ball* v. *Hesketh*, Comb. 381; *Wood* v. *Witherick*, Noy, 87.

(*u*) *Borthwick* v. *Carruthers*, 1 T. R. 648; Rose. Ev. 247.

(*x*) *Thrupp* v. *Fielder*, 2 Esp. 628; *Lara* v. *Bird*, Peake's Ev. 297; *Hyling* v. *Hastings*, 1 Ld. Raym, 389, *per* Holt, C. J.

(*y*) *Harmer* v. *Killing*, 5 Esp. 102.

(*z*) *Thornton* v. *Illingworth*, 2 B. & C. 824; *Cohen* v. *Armstrong*, 1 M. & S. 724; though a promise is sufficient after action brought to take a case out of the Statute of Limitations, *Yea* v. *Fouraker*, 2 Burr. 1099.

(*a*) *Stone* v. *Wythipoll*, Cro. Eliz. 126.

(*b*) *Green* v. *Parker*, Peake's Ev. 297. Payment of money into Court, as to part of the demand, is not such an acknowledge-

promise was "to pay when he is able," the plaintiff must prove ability to pay, at the time that the action is brought (*c*).

Promise must be in writing.

The promise must now be in writing and signed. By Lord Tenterden's Act (*d*), it is provided that "No action shall be maintained, whereby to "charge any person upon any promise, made after "full age, to pay any debt contracted during "infancy, or upon any ratification after full age "of any promise or simple contract made during "infancy, unless such promise or ratification shall "be made by some writing signed by the party "to be charged therewith." (*e*)

Disaffirmance rescinds *in toto*.

Where the contract made by the infant is only voidable, and the infant on coming of age, instead of confirming, rescinds it, the whole must be taken to be rescinded; therefore, where the plaintiff, when a minor, had given a sum of money in order to be admitted into a trading partnership with the defendant, which contract he subsequently rescinded, it was held that he might recover back the money in an action for money had and received (*f*). This decision went on the

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ment of the plaintiff's right of action, as will preclude the defence of infancy to the residue; because the money paid into Court might be for necessaries. *Hitchcock* v. *Tyson*, 2 Esp. 481, *n*.

(*c*) *Cole* v. *Saxby*, 3 Esp. 159.

(*d*) 9 Geo. IV. c. 14.

(*e*) Id. s. 5.

(*f*) *Corpe* v. *Overton*, 10 Bingh. 252; S. C. 3 M. & Sc. 738; see *Adlington* v. *Gervas*, Hob. 77. There have been *dicta* to the

ground that no consideration whatever had been received by the infant; for it had been decided, that if a partial consideration for the money had been received, it could not have been recovered back (*g*); and this doctrine was recognised by the Court. (*h*)

Where the contract is absolutely void.

Where the contract made by the infant is not merely voidable but absolutely void, no subsequent ratification can revive it; as a contract by an infant, for the purchase of an annuity (*i*). So an infant-obligor cannot ratify, after coming of age, a bond conditioned for the payment of principal and interest (*k*), nor a bond with a penalty (*l*). But by a subsequent promise to pay a promissory note made during infancy (*m*), or by accepting, when of full age, a bill of exchange drawn during infancy (*n*), the party will become liable.

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contrary; Wilmot's Notes, 226, *n*; 2 Eden, 72, *per* Lord Mansfield, C. J.; 8 Taunt. 510, *per* Gibbs, C. J.

(*g*) *Holmes* v. *Blogg*, 8 Taunt. 508; S. C. 1 B. Moore 466; 2 B. Moore, 552; see *Drury* v. *Drury*, 2 Eden, 39; *Buckinghamshire* v. *Drury*; 2 Eden, 60; S. C. Brown, P. C., 492.

(*h*) See the judgment of *Tindal*, C. J., *Corpe* v. *Overton*, 10 Bingh. 255—6.

(*i*) Under the stat. 17 Geo. III. c. 26, s. 6., and 53 Geo. III., c. 141, s. 8.

(*k*) *Fisher* v. *Mowbray*, 8 East, 330.

(*l*) *Baylis* v. *Dinely*, 3 M. & S. 477; S. C. 2 Chit. Rep. 153.

(*m*) *Hunt* v. *Massey*, 3 Nev. & M. 109.

(*n*) *Stevens* v. *Jackson*, 4 Campb. 164.

SECTION II.—COVERTURE. (*a*)

Married woman cannot contract.

A married woman is under as great a disability in law, as an infant, to enter into contracts (*b*); therefore, the general rule is, that the coverture of the vendee at the time of the contract is a bar to an action brought by the vendor, whether against the husband and wife singly, or both jointly (*c*). And the defendant is not estopped from pleading coverture, though she may have represented herself as a *feme sole* (*d*). But as the husband is bound in law to provide his wife and family with necessaries, he will be liable for the debts which his wife may contract in the purchase of necessaries (*e*), unless he has given particular notice to the contrary (*f*).

(*a*) The following section relates to the subject of coverture, only as a plea in bar to the action, whatever parties may be made plaintiffs or defendants, and not as a plea in abatement for misjoinder.

(*b*) See *Smith* v. *Plomer*, 15 East, 607.

(*c*) Com. Dig. *Baron & Feme*, Q; Bac. Abr. *Baron & Feme*, H.; Gilb. Ev. 83. [But the queen consort may sue and be sued as a feme sole; Co. Litt. 133, *a*. In equity, if a woman having a separate estate promises to pay a debt out of it, the estate will be liable; *Bell* v. *Hyde*, Prec. Chan. 328; or even if the promise be to pay generally; *Murray* v. *Barlee*, 4 Sim. 82.]

(*d*) *Davenport* v. *Nelson*, 4 Campb. 26; *Cowley* v. *Robertson*, 3 Campb. 438; *M'Namara* v. *Fisher*, 3 Esp. 18; *Smith* v. *Wilkins*, 6 C. & P. 180.

(*e*) 1 Bl. Comm. 442.

(*f*) Bull. N. P. 135.

The liability of the husband in respect of the contracts of his wife varies, according to whether the parties are living together or separate, and in the latter case, whether the separation is the act of one party only, or is mutual. The four following heads seem to comprise all the different classes of cases :—

1. Where husband and wife cohabit.

2. Where they do not cohabit, and the act of separation is on the part of the husband.

3. Where they do not cohabit, and the act of separation is on the part of the wife.

4. Where they do not cohabit, and the act of separation is mutual, or by operation of law.

1. *Where husband and wife cohabit.*

Where parties live together, wife has implied authority to contract for necessaries.

Where the parties live together, the husband will be liable for necessaries purchased by the wife, because his assent, authorizing the wife to act as his agent, may *primâ facie* be implied from the very circumstance of cohabitation (*g*). And on the principle that the wife is the presumed agent of her husband, her admission will be considered his act, and is evidence to bind him (*h*); there-

(*g*) *Etherington* v. *Parrott*, 1 Salk. 118; *Langfort* v. *Tiler*, 1 Salk. 113; see 1 Sid. 128; Skinn. 349; 1 Brownl. 47. [Even where the husband is an infant; *Turner* v. *Trisby*, 1 Str. 168.]

(*h*) *Anderson* v. *Saunderson*, 2 Stark. N. P. C. 204; *Clifford* v. *Burton*, 1 Bingh. 199; *Emmerson* v. *Blonden*, 1 Esp. 142; *Palethorp* v. *Furnish*, 2 Esp. 511, *n*; *Gregory* v. *Parker*, 1 Campb. 394; *Williams* v. *Johnson*, 1 Str. 504; *Anon.* 1 Str. 527.

fore the husband would be liable for necessary physic for the wife (*i*), for lodging (*k*), clothing, &c. (*l*); for dresses, which, though costly are not above the station of the defendant (*m*): for food (*n*), education and other necessaries for his children (*o*); but not for a debt which his wife has contracted under illegal circumstances (*p*). The question, what are and what are not necessaries, must depend on the rank, situation, and circumstances of the husband (*q*), and is a question for the consideration of the jury (*r*). It ought rather to depend on his estate than his degree; for one of high degree may be of low estate (*s*); yet, however low a man's circumstances may be,

(*i*) *Harris* v. *Lee*, 1 P. Wms. 482.

(*k*) *Beaumont* v. *Weldon*, 1 Ventr. 255.

(*l*) *Dyer* v. *East*, 1 Ventr. 42; 1 Mod. 9.

(*m*) *Morton* v. *Withens*, Skinn. 348.

(*n*) *Ross* v. *Noel*, Bull. N. P. 136.

(*o*) *Garbrand* v. *Allen*, Comb. 450; *Calverley* v. *Plumner*, 2 Lev. 16. [A father is liable for the maintenance of his illegitimate child if he adopts it as his own, though no order of affiliation have been made upon him (*Hesketh* v. *Groning*, 5 Esp. 131; see *Shaw* v. *Whiteman*, Peake 42 (3rd Ed.)); but not for children of his wife by a former husband (*Tubb* v. *Harrison*, 4 T. R. 118; *Cooper* v. *Martin*, 4 East, 76); unless he adopts them as part of his family (*Stone* v. *Carr*, 3 Esp. 1.)]

(*p*) *Fowles* v. *Dinely*, 2 Str. 1122; *Anon.* 2 Show, 283.

(*q*) *Per* Lord Mansfield, C. J., *Ozard* v. *Durnford*, Selw. N. P. 279.

(*r*) Bac. Abr. *Baron and Feme*, H. *Per* Best, C. J., *Hunt* v. *Blaquiere*, 3 M. and Payne, 122.

(*s*) *Per* Hale, C. B., Bac. Abr. *supra*.

if he allows his wife to assume an appearance above that which he is in a condition to support, he will be answerable for the consequences (*t*).

As long as the husband and wife live together, the husband will be liable, however immoral and improper the conduct of the wife may be (*u*); so, if after she has committed adultery, and eloped, the husband receives her again (*x*); so, if she has committed adultery, and the husband leaves her, but allows her to remain in the house, and gives no notice to tradesmen of her situation (*y*). The same rule holds, where a man and woman cohabit without being really married (*z*); or where a marriage has taken place *de facto*, but is void on account of a prior marriage subsisting (*a*); for if he holds her out to the world as his wife, it is but reasonable that he should be liable for debts contracted by her in that character. But if the marriage can be disproved, the husband will not

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(*t*) *Waithman* v. *Wakefield*, 1 Campb. 120, *per* Lord *Ellenborough*, C. J. [But the tradesman must exercise a reasonable degree of caution. *Ib.*]

(*u*) Bac. Abr. *Baron and Feme*, H. *Robinson* v. *Greinold*, 1 Salk. 119.

(*x*) *Harris* v. *Morris*, 4 Esp. 41; *Robinson* v. *Gosnold*, 6 Mod. 171.

(*y*) *Norton* v. *Fazan*, 1 B. & P. 226.

(*z*) *Watson* v. *Threkeld*, 2 Esp. 637; *Hudson* v. *Brent*, Esp. Dig. 124; *Carr* v. *King*, 12 Mod. 372; *Norwood* v. *Stevenson*, Andr. 227.

(*a*) *Robinson* v. *Nahon*, 1 Campb. 245.

be liable after cohabitation has ceased (*b*); nor will his executor be liable for debts which she has contracted since his death, whether information of his death had or had not been received at the time of the contract (*c*).

The implied authority may be rebutted.

As the implied authority given by the husband rests only on *primâ facie* evidence, it is liable to be rebutted by express proof that the husband prohibited the vendor (or his agent), from giving credit to the wife (*d*); and in such case he will not be liable even for necessaries. Or the presumption of authority may be rebutted even by implication; as, where, during temporary absence, the husband made an allowance to his wife, for supplying herself and her family, and a tradesman, with notice of this circumstance, furnished butcher's meat on credit (*e*). So, the husband is not liable where he supplies her with every necessary suitable to her rank and station, and a tradesman allows her to incur an extravagant debt without the husband's knowledge (*f*).

(*b*) *Munro* v. *De Chemant*, 4 Campb. 215, *cor.* Lord *Ellenborough*, C. J.

(*c*) *Blades* v. *Free*, 9 B. & C. 167; S. C. 4 Man. & Ry. 282.

(*d*) *Etherington* v. *Parrott*, 1 Salk. 118; *Longworth* v. *Hackmore*, Bull. N. P. 135; *Rawlins* v. *Vandyke*, 3 Esp. 250, *per* Lord *Ellenborough*, C. J.

(*e*) *Holt* v. *Brien*, 4 B. & A. 252.

(*f*) *Seaton* v. *Benedict*, 5 Bingh. 28; *Baker* v. *Baber*, Selw. N. P. 284; *Keniston* v. *Goodall*, ibid.

No presumption of authority where the goods are not necessaries.

In general, where the goods furnished are not necessaries, the presumption is against the assent of the husband having been given, and the *onus* of proof lies on the plaintiff; therefore, where the vendor brought an action for expensive jewellery furnished to the wife, but could prove neither assent nor knowledge on the part of the husband, he was nonsuited (*g*). So, where the vendor supplied costly dresses to the wife, without authority, and took her note in payment, it was held that he could not recover (*h*). The husband will not be liable for money lent to his wife, without his authority (*i*); even, as it seems, if the money was applied to the purchase of necessaries (*k*). Otherwise, if the money was lent at his special instance and request (*l*).

But express authority may be given.

If the husband gives express authority to his wife to act as his agent, or what amounts to the same, allows her to contract with his knowledge, he will be liable whether the contract be for necessaries or not. This was held even where the parties had been separated for some time, the

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(*g*) *Montague* v. *Benedict*, 3 B. & C. 631; *Montague* v. *Espinasse*, 1 C. & P. 356, 502; *Montague* v. *Baron*, 5 D. & R. 532.

(*h*) *Metcalfe* v. *Shaw*, 3 Campb. 22.

(*i*) *Stone* v. *M'Nair* (in error), 7 Taunt. 432; S. C. 4 Price 48; 1 B. Moore 126.

(*k*) Ibid.; 1 Salk. 387. [But the husband would be liable in equity; *Harris* v. *Lee*, 1 P. Wms. 482.]

(*l*) *Stephenson* v. *Hardy*, 3 Wils. 388; S. C. 2 Bl. Rep. 872.

husband having been imprisoned, and the wife in the meantime having conducted the business, and after his return having continued the management (*m*). The assent of the husband may be implied to contracts of the wife, where he has ratified previous contracts of the same nature and in the same business (*n*). A feme covert may, with her husband's assent, indorse a promissory note (*o*), or bill of exchange (*p*), or borrow money (*q*). But if the vendor has given credit to the wife alone, as by debiting her in his books, or drawing bills for her acceptance, the husband will not be liable for the goods,-although proof can be given that he has seen them in her possession (*r*).

Subsequent promise to pay is binding.

If after the husband's death the wife promises to pay a debt which she has previously contracted, the moral obligation will be a sufficient consideration to support the promise (*s*); but all the circumstances, which show that the money was

(*m*) *Petty* v. *Anderson*, 3 Bingh. 170; S. C. 2 C. & P. 38; see *Plimmer* v. *Sells*, 3 Nev. & M. 422.

(*n*) *Forsyth* v. *Milne*, Paley Pr. & A. p. 163. 3rd Ed.

(*o*) *Coates* v. *Davies*, 1 Campb. 485; *Barlow* v. *Bishop*, 1 East, 432; S. C. 3 Esp. 266.

(*p*) *Prestwich* v. *Marshall*, 4 C. & P. 594; S. C. 7 Bingh. 565; *Prince* v. *Brunatte*, 1 Bingh. N. S. 435.

(*q*) *Stephenson* v. *Hardy*, 3 Wils. 388.

(*r*) *Bentley* v. *Griffin*, 5 Taunt. 356; see *Metcalf* v. *Shaw*, 3 Campb. 22; *Taylor* v. *Brittan*, 1 C. & P. 16 n.

(*s*) *Lee* v. *Muggeridge*, 5 Taunt. 36.

due in conscience," ought to be correctly set forth in the declaration (*t*).

Where husband separates from his wife, he is equally liable.

2. *Where husband and wife do not cohabit, and the act of separation is on the part of the husband.*

In general, where the separation has been caused by the husband, he will be equally liable for the debts of his wife, as if cohabitation continued; or, rather perhaps in a still greater degree, if he does not contribute to her proper maintenance (*a*). Therefore, where he deserts his wife or turns her out of doors causelessly, he is liable (*b*), and in such case if he does not properly provide for her, he cannot make a particular prohibition against any individual tradesman (*c*).

It has been frequently held at *nisi prius*, that the law is the same when the husband *constructively* turns his wife out of doors, as by cruelty and ill-

(*t*) *Littlefield* v. *Shee*, 2 B. & Adol. 811. [Lord *Tenterden*, C. J. said that the doctrine, that a moral obligation is a sufficient consideration for a subsequent promise, must be received with some limitation, ib. 813; and see 2 Wms. Saund. 137 d. note b.]

(*a*) *Thompson* v. *Hervey*, 4 Burr. 2177. [Where the parties are living separate, and an action is brought for necessaries supplied to the wife, they ought to be specially stated to have been provided for her; *Ramsden* v. *Ambrose*, 1 Str. 127.]

(*b*) Bac. Abr. *Baron and Feme*, H.; Bull. N. P. 135; *Shepherd* v. *Mackoul*, 3 Campb. 326; *Warr* v. *Huntly*, 1 Salk. 118; S. C. Holt, 102; *Ewers* v. *Hutton*, 3 Esp. 255. See *Jenkins* v. *Tucker*, 1 H. Bl. 90.

(*c*) *Bolton* v. *Prentice*, 2 Str. 1214, reported more fully Selw. N. P. 281; *Harris* v. *Morris*, 4 Esp. 41.

treatment (*d*); or by rendering the house unfit for her residence by bringing another woman to reside in it (*e*); or where the husband is guilty of any impropriety which affords a reasonable ground of justification to the wife in quitting his protection. And these cases seem to be good law, notwithstanding the doubts thrown upon them in the case of *Horwood* v. *Heffer* (*f*), for the latter case has been disapproved of, and may be considered as overruled (*g*). It is a question for the jury, whether the apprehension of personal violence and ill-treatment has been sufficiently great to justify the wife in removing from the house (*h*). If the wife has left the house for a reasonable cause, it is not sufficient to discharge the husband's liability that he has merely requested her to return to his protection (*i*).

(*d*) *Hodges* v. *Hodges*, 1 Esp. 441; *Emery* v. *Emery*, 1 Y. & J. 501; *Reed* v. *Moore*, 5 C. & P. 200.

(*e*) *Aldis* v. *Chapman*, Selw. N. P. 281, *coram* Lord *Ellenborough*, C. J.; *Liddlow* v. *Wilmot*, 2 Stark. N. P. C. 86.

(*f*) 3 Taunt. 421; *Lawrence*, J., said "the wife might, if she thought fit, have sued for alimony, and a divorce a *mensâ et toro*." And *Mansfield*, C. J. thought nothing short of *actual terror and violence* would support the action.

(*g*) *Houliston* v. *Smyth*, 3 Bingh. 127; S. C. 2 C. & P. 22: see the judgment of the court. *Best*, C. J. said, that if he had recollected the cases decided by Lord *Ellenborough* (*Aldis* v. *Chapman*, and *Liddlow* v. *Wilmot*), he should have decided, even at *nisi prius*, against the case of *Horwood* v. *Heffer*; see 3 Bingh. 130.

(*h*) *Ibid.*

(*i*) *Emery* v. *Emery*, 1 Y. & J. 501. (*Alexander*, C. B. *dubitante.*)

Cases where he has left property with his wife.

To make the husband liable for necessaries supplied to his wife in cases where he has quitted her and gone abroad, if he has left any property behind, the plaintiff must show that such property was inadequate to her support (*h*), and that the goods supplied accorded with the rank and station which the wife notoriously assumed (*i*).

Cases where wife may be treated as *feme sole*.

In some cases where the husband has separated himself from his wife, she may be treated as a *feme sole*, and will be liable to be sued on her own contracts; as, where the husband has abjured the realm (*k*). It has been held, that the departure from England by a foreigner, and protracted residence abroad, were tantamount to abjuration, and that his wife, remaining here, was liable for her own debts (*l*). But this doctrine has been denied, and seems to be considered overruled (*m*). It will be a sufficient bar to the action, if the defendant can show that her husband has been alive during the

(*h*) *Bird* v. *Jones*, 3 Man. & Ry. 121.

(*i*) *Dennys* v. *Sargeant*, 6 C. & P. 419.

(*k*) Co. Litt. 132 b. 133 a.

(*l*) *De Gaillon* v. *L'Aigle*, 1 B. & P. 8, 357, 368; *Walford* v. *Duchess de Pienne*, 2 Esp. 554; *Franks* v. *Ditto*, 2 Esp. 587, *cor.* Lord *Kenyon*, C. J.

(*m*) *Kay* v. *Duchess de Pienne*, 3 Campb. 123. Lord *Ellenborough*, C. J. said, "I do not know whether it was distinctly brought to Lord *Kenyon's* attention, that the *Duc de Pienne* had been living with the defendant as his wife within the realm; if so, I cannot subscribe to his opinion." And see *Stretton* v. *Busnach*, 1 Bingh. N. S. 139; S. C. 4 M. & Sc. 678; *Farrar* v. *Granard*, 1 N. R. 80; *Boggett* v. *Frier*, 11 East, 301.

seven years next before action brought (*n*); and the rule holds still stronger where the husband is an Englishman, because in such case the *animus revertendi* will be presumed (*o*). But, it seems, if the husband is an alien who never resided in England, and the wife represents herself as a *feme sole*, she may be sued as such (*p*). The marriage is virtually dissolved, and the wife may be sued alone, where the husband has been banished the kingdom (*q*). So, if he has been transported for a limited period, the disability is suspended during the term of transportation (*r*); and the wife of a convict, who is sentenced to transportation but remains in the hulks in this country, may trade as a *feme sole*, and is liable to become bankrupt (*s*).

Feme sole trader.

When a married woman trades as a *feme sole*, the custom of trade will not enable her to sue (*t*), nor make her liable to be sued (*u*), as such, in the

(*n*) *Deerly* v. *Duchess of Mazarine*, 1 Salk. 116.

(*o*) *Marsh* v. *Hutchinson*, 2 B. & P. 226; *Williamson* v. *Dawes*, 9 Bingh. 292.

(*p*) *Deerly* v. *Duchess of Mazarine*, 1 Salk. 116; *Kay* v. *Duchess de Pienne*, 3 Campb. 123.

(*q*) *Belknap's* case; *Weyland's* case, Co. Litt. 133 a; *Wilmot's* case, Moor. 851; *Portland* v. *Podgers*, 2 Vern. 104; *Anon.* v. *Wilmore*, 1 Rolle Rep. 400.

(*r*) *Carroll* v. *Blencow*, 4 Esp. 27; *Sparrow* v. *Carruthers*, cited 2 Bl. Rep. 1197, and 1 T. R. 6.

(*s*) Ex parte *Franks*, 7 Bingh. 762.

(*t*) *Caudell* v. *Shaw*, 4 T. R. 361.

(*u*) *Clayton* v. *Adams*, 6 T. R. 605.

superior courts of Westminster, even where the custom appears on the record (*x*).

3. *Where husband and wife do not cohabit, and the act of separation is on the part of the wife.*

Case of *Manby* v. *Scott*.

The leading authority on this subject is the case of *Manby* v. *Scott* (*y*). It is laid down by *Hale*, C. B. that, "upon the departure of the wife, all evidence of any obligation of the husband to maintain her, ceases; it would else be very unreasonable, for while they are both in one house, the same provision will serve for both" (*z*). The *departure* of the wife must be here taken to mean, her voluntary departure without the assent of her husband, and without reasonable and justifiable cause; for, if the conduct of the husband compels her to leave him, the act is his own, as much as if he actually turned her away (*a*). The rule laid down in *Manby* v. *Scott* was, that an express prohibition to the plaintiff against trusting the wife, who had voluntarily left her husband and lived

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(*x*) *Beard* v. *Webb*, (in error) 2 B. & P. 93.

(*y*) 1 Sid. 109; S. C. 1 Mod. 128; 1 Lev. 4; 1 Keble, 69; Bac. Abr. *Baron and Feme*, H. The case was decided in the Exchequer Chamber by eight judges against three; but *Atkins*, B., one of the eight, agreed with the three, that, if there had been no special prohibition, it would have been otherwise. [And see *Ramsden* v. *Ambrose*, 1 Str. 127; *Harris* v. *Collins*, Bull. N. P. 136; *Hindley* v. *Westmeath*, 6 B. & C. 200.]

(*z*) *Manby* v. *Scott*, Bac. Abr. *Baron and Feme*, H.

(*a*) *Supra*, p. 32.

apart, discharged the husband's liability, though the goods were necessaries, and the wife had no separate maintenance.

Adultery or elopement of wife discharges the husband's liability.

Accordingly, it is now the established doctrine, that, where the wife elopes with an adulterer, any tradesman who gives her credit, even for necessaries, does so at his peril, whether he has had notice of her elopement or not (*b*); nor is the husband bound to receive her back, or to support her, though he himself have committed adultery(*c*). If the wife has been guilty of adultery, though she may not have eloped, but has been turned out of doors by her husband, the act of separation will be considered to be on her part, and the husband's liability is discharged on proof of the adultery (*d*).

In all cases where a married woman lives apart from her husband, it is the duty of a tradesman, before trusting her, to make inquiry into the circumstances under which the separation has taken place (*e*); and in an action, brought against the husband, the proof rests on the plaintiff that the wife was justified in living apart (*f*).

(*b*) Bull. N. P. 135; *Morris* v. *Martin*, 1 Str. 647; *Mainwaring* v. *Sands*, 1 Str. 706; *Child* v. *Hardyman*, 2 Str. 875; *Robinson* v. *Greinold*, 1 Salk. 119; *Hall* v. *Gates*, 11 Mod. 241.

(*c*) *Govier* v. *Hancock*, 6 T. R. 603. See *Rex* v. *Flintan*, 1 B. & Ad. 227.

(*d*) *Walton* v. *Green*, 1 C. & P. 621; *Ham* v. *Tovvey*, Selw. N. P. 278.

(*e*) *Clifford* v. *Laton*, 3 C. & P. 15.

(*f*) *Mainwaring* v. *Leslie*, 2 C. & P. 507; S. C. 1 M. & Malk. 18.

4. *Where the husband and wife do not cohabit, and the act of separation is mutual, or by operation of law.*

Agreement to live separate is legal.

An agreement between husband and wife to live separate, is a perfectly legal agreement (*g*). Where the husband and wife separate by mutual consent, whether it be by deed of separation or otherwise, the husband will not be liable for her debts, provided he secures to her an adequate allowance (*h*).

Husband not liable if he pays adequate allowance.

The sufficiency of the sum allowed is a question of fact for the jury, depending on the rank and circumstances of the husband, and is not to be inferred from the mere acquiescence of the wife (*i*); and if the husband fails to pay the stipulated allowance regularly, his liability is not discharged (*k*). It seems to be unnecessary to prove that the plaintiff had notice of the separate maintenance allowed to the wife (*l*); though it has once been held that such notice is necessary (*m*).

(*g*) *Scholey* v. *Goodman*, 1 C. & P. 36; S. C. 8 B. Moore, 350. 1 Bingh. 349.

(*h*) *Nurse* v. *Craig*, 2 N. R. 148; *Todd* v. *Stokes*, 1 Ld. Raym. 444; S. C. 1 Salk. 116; *Ozard* v. *Durnford*, Selw. N. P. 279; *Stedman* v. *Gooch*, 1 Esp. 6; *Cragg* v. *Bowan*, 6 Mod. 147; *Hyde* v. *Price*, 3 Ves. Jun. 445; so, where the separation is by the sentence of a spiritual court, *Hunt* v. *Blaquiere*, 3 M. & Payne, 121, see *per Best*, C. J.

(*i*) *Hodgkinson* v. *Fletcher*, 4 Campb. 70.

(*k*) *Nurse* v. *Craig*, 2 N. R. 148; *Hunt* v. *De Blaquiere*, 5 Bingh. 550; S. C. 3 M. & Payne, 108.

(*l*) *Turner* v. *Winter*, Selw. N. P. 280.

(*m*) *Rawlins* v. *Vandyke*, 3 Esp. 250.

It is immaterial whether the source, from which the funds for the wife's maintenance proceed, be the husband himself or not, provided such funds are adequate (*n*); and provided they are permanent, for if they depend on a mere voluntary pension, the husband continues liable (*o*).

To discharge the husband, the deed of separation must provide for an immediate, and not for a future separation to take place at the will of either party; otherwise the deed is null and void (*p*). And where the deed is to trustees for the use of the wife, the husband must show that the trustees have given effect to the deed (*q*). So, a decree of alimony is no bar, if the debt was contracted before the decree, and while the suit was pending in the Ecclesiastical Court (*r*); but alimony decreed *pendente lite* is a bar, provided the husband pays it, although the decree be for the time rendered inoperative by removal of the cause into a superior court (*s*).

Even where the husband's liability is discharged by allowing his wife a fund for her separate maintenance, an action for goods sold may be maintained against him on an express promise to pay

Express promise to pay binds the husband.

(*n*) *Liddlow* v. *Wilmot*, 2 Stark. N. P. C. 86.

(*o*) *Thompson* v. *Hervey*, 4 Burr. 2177.

(*p*) *Durant* v. *Titley*, 7 Price, 577; *Hindley* v. *Marquis of Westmeath*, 6 B. & C. 200.

(*q*) *Burrett* v. *Booty*, 8 Taunt. 343.

(*r*) *Keegan* v. *Smith*, 5 B. & C. 375.

(*s*) *Willson* v. *Smyth*, 1 B. & Ad. 801.

the debt contracted by her (*t*). It is difficult to see what is the consideration to support such promise (*u*); it is said, that the promise may be considered almost conclusive evidence of an admission of the insufficiency of the separate allowance (*x*).

It was formerly decided (contrary to the principles of common law), that where husband and wife lived separate and the latter had a separate maintenance, since the husband ceased to be liable, the wife might be treated as a *feme sole*, and sued on her own contracts (*y*). But this doctrine has been overruled by a case, resolved upon the unanimous opinion of the judges after great deliberation (*z*). Lord *Kenyon*, in his judgment, observed: —"It may be asked how it can be in the power of any persons, by their private agreement, to alter the character and condition which by law results from the state of marriage while it subsists, and from thence to infer rights of action and legal responsibilities, as consequences following from

(*t*) *Hornbuckle* v. *Hornbury*, 2 Stark. N. P. C. 177; *Harrison* v. *Hall*, 1 M. & Rob. 185. See *Williams* v. *Fowler*, 1 M'Cl. & Y. 269.

(*u*) *Fabian* v. *Plant*, 1 Show. 183.

(*x*) 1 M. &. Rob. 186, n.

(*y*) *Ringstead* v. *Lady Lanesborough*, cited 8 T. R. 548; *Barwell* v. *Brooks*, *ibid.*; *Corbet* v. *Poelnitz*, 1 T. R. 5; *Stedman* v. *Gooch*, 1 Esp. 6; *Cox* v. *Kitchen*, 1 B. & P. 338.

(*z*) *Marshall* v. *Rutton*, 8 T. R. 545. And see *Hatchett* v. *Baddely*, 2 Bl. Rep. 1079; *Lean* v. *Schutz*, 2 Bl. Rep. 1195; *Gilchrist* v. *Brown*, 4 T. R. 766; *Ellagh* v. *Leigh*, 5 T. R. 679; *Hookham* v. *Chambers*, 3 B. & B. 92.

such alteration of character and condition"(*a*). "We find no authority in the books to show, that a woman may be sued as a *feme sole*, while the relation of marriage subsists, and she and her husband are living in this kingdom"(*b*). Accordingly, it has ever since been held, that a woman cannot be sued alone as long as the marriage remains, neither actually dissolved by divorce or the natural death of the parties, nor virtually dissolved by the civil death of the husband (*c*). A divorce *a vinculo matrimonii*, of course, has the effect of placing the woman in the condition of a *feme sole*, because, the marriage being dissolved *ab initio*, it is the same as if it had never subsisted (*d*); but a divorce a *mensâ et toro* creates no such liability (*e*).

Wife living separate is not liable as a *feme sole*.

SECTION III.—IDIOCY AND LUNACY.

The contracts of one who is *non compos mentis* are in general null and void, unless it be for necessaries (*a*). Formerly, it was said that a defendant

Idiot or lunatic cannot contract.

(*a*) *Per* Lord *Kenyon*, C. J. 8 T. R. 547.

(*b*) *Id.* 548.

(*c*) *Vid. supra*, p. 35.

(*d*) *Anstey* v. *Manners*, Gow, 10. So, if the marriage be declared to be null from the first on the ground of being invalid according to the laws of the country where it took place; *Lacon* v. *Higgins*, 1 D. & R. 38.

(*e*) *Lewis* v. *Lee*, 3 B. & C. 291; S. C. 5 D. & R. 98; *Fairthorne* v. *Blaquiere*, 6 M. &. S. 73.

(*a*) Co. Litt. 247, a.; Shelf. Lun. p. 242; Holt. 357; 1 Sid. 112.

could not avail himself of the plea of idiocy or lunacy, as a defence to any action, on the ground that no one should be permitted to stultify himself (*b*). But the law seems now to be different, and such a defence would always be a bar to any action, where it appears that the plaintiff has been guilty of fraud or imposition. In an action for goods sold and delivered, where the plaintiff was proved to have had knowledge of the vendee's insanity, and to have taken advantage of it, he was nonsuited (*c*). But idiots or lunatics, as much as infants, may bind themselves by a contract for necessaries (*d*); and insanity is no defence where imposition cannot be imputed to the plaintiff (*e*). Even equity will not relieve merely on the ground that the vendee was of a weak mind, because the Court will not measure people's understandings and capacities (*f*); otherwise, if there have been fraud and imposition (*g*).

Except for necessaries.

In a case (*h*) decided in K. B., the liability of a

(*b*) *Beverley's* case, 4 Co. Rep. 124; *Stroud* v. *Marshall*, Cro. Eliz. 398; *Cross* v. *Andrews*, Cro. Eliz. 622; *Yates* v. *Boen*, 2 Str. 1104.

(*c*) *Levy* v. *Baker*, 1 M. & Malk. 106 n.; *Sentance* v. *Poole*, 3 C. & P. 1.

(*d*) Sid. 112; Holt. 357; Shelf. Lun. 410; Fonbl. Eq. 48.

(*e*) *Browne* v. *Joddrell*, 3 C. & P. 80; S. C. 1 M. & Malk. 105; *Niell* v. *Morley*, 9 Ves. Jun. 478.

(*f*) *Osmond* v. *Fitzroy*, 3 P. Wms. 130.

(*g*) *Bennett* v. *Vade*, 2 Atk. 324; *M'Diarmid* v. *M'Diarmid*, 3 Bligh, N. S. 374; Fonbl. Eq. 64.

(*h*) *Bagster and others* v. *Portsmouth* (Earl), 7 D. & R. 614; S. C. 5 B. & C. 170; 2 C. & P. 178.

lunatic upon his contract was fully considered. The plaintiffs had made carriages to the order of the defendant (Lord Portsmouth), who was to have them for a certain sum *per annum*, the plaintiffs keeping them in repair. The defence was, that the defendant had been found and declared, by a commission of lunacy, to have been insane for several years prior to the contract; it was adjudged, nevertheless, that the plaintiffs should recover, as the carriages were suitable to the defendant's rank and fortune, and no fraud had been practised by the plaintiffs. Bayley J. said (*i*), "Imposition and fraud, generally speaking, are grounds for vacating all contracts; and, with respect to the case of a person of unsound mind, if it can be proved that he has been defrauded, or an undue advantage taken of his imbecility, a Court of law will not enforce the contract. But where there is no imposition practised, and the goods supplied appear to be suitable for the condition and degree of the party receiving them, and which in the ordinary habits of life he would be likely to require, I think the mere fact of his being of unsound mind, and incapacitated from making his own contracts, will not deprive a tradesman of his right of suing in a Court of law for the value of the goods for which he has given credit." It may, therefore, be laid down, that where either vendor or vendee is *non*

Case of Bagster v. Lord Portsmouth.

(*i*) 7 D. & R. 617.

compos mentis, a contract of sale will nevertheless be valid, if no imposition was practised on the part of the plaintiff, and if the defendant was clearly not prejudiced by his mental imbecility.

SECTION IV.—ATTAINDER.

Persons attainted cannotcontract.

Persons outlawed (*a*), or attainted, are incapable of contracting, because they can have no property in goods; since all personal property, accruing to them either before or after attainder, is vested in the crown without office found (*b*). The disability consequent upon attainder is removed, by a pardon under the great seal (*c*); or, by completion of the punishment which the offender has been adjudged to suffer (*d*). It was held by Holt, C. J., that a transfer of goods without valuable consideration, by one on the eve of trial for felony, was void (*e*). But the decision proceeded on the ground of fraud; for, if the sale

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(*a*) *Hage* v. *Skinner*, 3 Lev. 29; Bac. Abr. *Outlawry* D.; *Rex* v. *Cook*, 1 M'Clel. & Y. 196.

(*b*) *Bullock* v. *Dodds*, 2 B. & A. 258: see *Lambert* v. *Taylor*, 6 D. & R. 188; 1 Lutw. 610; Co. Litt. 391, a. [*Secus* as to real property, before office found; *Doe* v. *Pritchard*, 5 B. & Ad. 765.]

(*c*) *Bull* v. *Tilt*, 1 B. & P. 199.

(*d*) 9 Geo. IV. c. 32. s. 3.

(*e*) *Jones* v. *Ashurst*, Skinn. 357.

had been *bonâ fide*, it would have been good, since the property is not forfeited until conviction (*f*).

SECTION V.—ALIEN ENEMY.

Alien enemy cannot sue upon any contract.

An alien *friend* lies under no disability to contract or to maintain personal actions; because, it is said in Bacon's Abridgement, if he were incapacitated to merchandize, it might be as much to our prejudice as his own (*a*). But an alien *enemy* is utterly disabled from suing in England (*b*), whether the action be brought in his own name or in the name of another; therefore, even where the parties on the record are subjects of this realm, it is a good plea in bar, that the person interested (whose interest is alleged on the record) is an alien born, and the subject of a country at war with the King of Great Britain (*c*). The question always is, whether the plaintiff was alien enemy at the time

(*f*) Ib.; *Fleetwood's* case, 8 Rep. 171, a.—*Post.*

(*a*) Bac. Abr. *Alien* D.; Dyer 2, b.; *Tuerlcote* v. *Morison*, Yelv. 198; S. C. Bulstr. 134; *Openheimer* v. *Levy*, 2 Str. 1082; *Duckworth* v. *Tucker*, 2 Taunt. 37, n.; *Hoppen* v. *Leppet*, Andr. 76.

(*b*) Co. Litt. 127, b.; *Wells* v. *Williams*, 1 Salk. 46; *Bristow* v. *Towers*, 6 T. R. 35. [It had been held, that an alien enemy might recover on a right claimed to be acquired by him in actual war; *Ricord* v. *Bettenham*, 3 Burr. 1734; *Cornu* v. *Blackburn*, 2 Dougl. 641. But this doctrine is over-ruled; *Anthon* v. *Fisher*, 2 Dougl. 650. n.]

(*c*) *Brandon* v. *Nesbitt*, 6 T. R. 23.

of making the contract, and not whether he was so at the time only of the action brought. For, where a party is alien enemy when the contract is entered into, such contract is absolutely void, and cannot be enforced even on the return of peace (*d*); but where he becomes alien enemy subsequently, as there is nothing to render the contract itself illegal, the disability cannot be pleaded in perpetual bar, being only temporary and liable to be removed on the cessation of hostilities (*e*).

1. *Who is held to lie under the disability* (*f*).

A plaintiff may be incompetent to sue on the ground of being an alien enemy, though he be not a native of the hostile country; thus, where the consul of a neutral state is resident in an enemy's country and trades there, he cannot recover (*g*). So, even where the plaintiff is not alien born, as an English-

(*c*) *Brandon* v. *Curling*, 4 East, 410; *Willison* v. *Patteson*, 7 Taunt. 439; S. C. 1 B. Moore, 133.

(*e*) *Flindt* v. *Waters*, 15 East, 260; *Harman* v. *Kingston*, 3 Campb. 153; Ex parte *Boussmaker*, 13 Ves. Jun. 71; *De Tastet* v. *Taylor*, 4 Taunt. 233. [Where the plaintiff becomes alien enemy subsequently to the commencement of the action, the disability ought to be pleaded in bar of the *further* maintaining the suit; *Le Bret* v. *Papillon*, 4 East, 502. However the Court would not consider themselves bound by an improper prayer of judgment.]

(*f*) It is the province of government to decide in what relation of peace or war any country stands in respect of this kingdom; *Blackburne* v. *Thompson*, 15 East, 81.—*Post*. Chap. iv. Sect. 3.

(*g*) *Albrecht* v. *Sussman*, 2 Ves. & B. 323.

man residing and trading in an enemy's country(*h*), or residing there merely without carrying on trade (*i*). But if an Englishman resides in a neutral state, he may lawfully exercise the privileges of a subject of that country by trading with a nation at war with England (*k*), although if he were resident here, such trading would be illegal (*l*). And a neutral subject may maintain an action on a contract entered into with a British subject in an enemy's country (*m*).

Residence by a British subject in an enemy's country, does not disqualify him from entering into contracts, if such residence is involuntary; as where he is a prisoner of war (*n*). It seems to be doubtful whether an alien enemy, a prisoner of war in this country, would be disqualified (*o*): but a neutral, taken prisoner on board an enemy's ship, was allowed to sue on a contract made by him on the voyage to Great Britain (*p*).

(*h*) *M'Connell* v. *Hector*, 3 B. & P. 113; *O'Mealey* v. *Wilson*, 1 Campb. 482; *Willison* v. *Patteson*, 7 Taunt. 439.

(*i*) *De Launeville* v. *Phillips*, 2 N. R. 97. [But see *Roberts* v. *Hardy*, 3 M. & S. 533.]

(*k*) *Bell* v. *Reid*, 1 M. & S. 726.

(*l*) *Potts* v. *Bell*, 8 T. R. 548.—*Post.*

(*m*) *Houriet* v. *Morris*, 3 Campb. 303.

(*n*) *Daubuz* v. *Morshead*, 6 Taunt. 322; *Antoine* v. *Morshead*, 6 Taunt. 237.

(*o*) *Maria* v. *Hall*, 1 Taunt. 33. [No judgment was ever given in the case.]

(*p*) *Sparenburgh* v. *Banatyne*, 1 B. & P. 163.

2. *In what cases the disability is removed.*

When the disability is removed.

If an alien enemy comes here *sub salvo conductu*, his disability is removed (*q*); so, if an alien friend come here by licence and live under the protection of the king, and a war breaks out during his residence, he may nevertheless maintain an action (*r*). But if he pleads such protection in the latter case, he must prove that the king has sanctioned his stay after the commencement of hostilities (*s*), and not merely that his residence has been acquiesced in without molestation (*t*).

An alien enemy may also sue on a contract arising out of a trading adventure which has been legalized by a licence granted by the crown (*u*). And he may sue, at the conclusion of the war, on a subsequent promise to pay; for, though the original contract could not be enforced, there is a moral obligation sufficient to support the promise (*x*).

(*q*) Bac. Abr. *Alien*, D.

(*r*) *Wells* v. *Williams*, 1 Lord Raym. 282; S. C. 1 Salk. 46.

(*s*) *Boulton* v. *Dobree*, 2 Campb. 163.

(*t*) *Alciator* v. *Smith*, 3 Campb. 245.

(*u*) *Vandyck* v. *Whitmore*, 1 East, 475.—*Post*.

(*x*) *Duhammel* v. *Pickering*, 2 Stark. N. P. C. 90.

CHAP. III.

OF THE EFFECTS OF PARTICULAR STATUTES UPON CONTRACTS OF SALE.

THE various statutes, which affect contracts of sale, may be considered under the six following heads :—

I. The Statute of Frauds.
II. Statutes relating to the sale of Ships.
III. Statutes prohibiting the sale of particular chattels.
IV. Statutes prohibiting sales on particular days.
V. Statutes relating to sales fraudulent against creditors.
VI. Statutes relating to sales and purchases by bankrupts.

PART I.

OF THE EFFECT OF THE SEVENTEENTH SECTION OF THE STATUTE OF FRAUDS UPON CONTRACTS OF SALE.

Statute of Frauds.

The 17th section of the Statute of Frauds(*a*) provides, that "no contract for the sale of any "goods, wares, and merchandises, for the price of

(*a*) 29 Car. II. c. 3.

" ten pounds sterling or upwards, shall be allowed " to be good, except the buyer shall accept part of " the goods so sold, and actually receive the same; " or give something in earnest to bind the bargain, " or in part payment; or that some note or memo- " randum in writing of the said bargain be made, " and signed by the parties to be charged by such " contract, or their agents thereunto lawfully au- " thorised."

The subject may be considered under the following heads:—

I. What contracts of sale are within the statute.

II. What delivery and acceptance of the goods are sufficient to satisfy the statute.

III. What is held to amount to earnest or part payment.

IV. Of the note or memorandum required by the statute.

SECTION I.—*What Contracts of Sale are within the Statute.*

Executory contracts.

Executory contracts. It seems to have been formerly held, that the statute did not extend to executory contracts in general. In the case of *Clayton* v. *Andrews*(*b*), a contract to deliver, within three weeks or a month, a quantity of wheat,

(*b*) 4 Burr. 2101.

which at the time was unthreshed, was held not to be within the statute. To remedy the inconvenience of such a construction, it was enacted by Lord Tenterden's Act(*c*), that the provisions of the 17th section of the Statute of Frauds "shall "extend to all contracts for the sale of goods of "the value of ten pounds sterling and upwards, "notwithstanding the goods may be intended to be "delivered at some future time, or may not, at the "time of such contract, be actually made, procured, "or provided, or fit or ready for delivery, or some "act may be requisite for the making or completing "thereof, or rendering the same fit for delivery." 9 Geo. IV. c. 14, s. 7.

It was observed by Grose, J.(*d*) on the above-mentioned case of *Clayton* v. *Andrews* that, if by executory contracts were meant contracts to be executed on a future day, the decision would be tantamount to a total repeal of the 17th section. Although that case had been overruled(*e*) long before the passing of Lord Tenterden's Act, a distinction was still recognised, in executory contracts, between cases, where the subject matter of the contract existed *in solido*, and cases where it had no substantial existence at the time, but required something to be added before it should be in the

(*c*) 9 Geo. IV. c. 14, s. 7.

(*d*) *Cooper* v. *Elston*, 7 T. R. 16.

(*e*) Ib.; *Rondeau* v. *Wyatt*, 2 H. Bl. 63; *Alexander* v. *Comber*, 1 H. Bl. 20; *Garbutt* v. *Watson*, 5 B. & A. 613; *Hughes* v. *Breeds*, 2 C. & P. 159.

state contemplated by the terms of the contract. Sir J. Osborne(*f*) bespoke a chariot, and when it was made refused to take it;—Pratt, C. J., ruled that this was not within the statute. The principle here laid down, though cited by the Court in the overruled case of *Clayton* v. *Andrews* as the ground of that decision, was distinguished from the latter case, and acknowledged to be good law(*g*). Again, where the contract was for the purchase of several oak pins, which were not made at the time but had still to be cut from the slabs, the case was held not to be within the statute(*h*). On the other hand it was decided, that a contract with a miller for the sale of flour, which at the time was not ground, was within the statute(*i*). There would be some difficulty in reconciling these decisions; and cases may readily be conceived, where the distinction between contracts strictly for the sale of goods, and contracts for work and labour to be added to materials, might give rise to questions of great nicety. The statute therefore seems to have wisely removed the distinction altogether.

Auctions. *Sales by Auction*(*k*). It was formerly doubted,

(*f*) *Towers* v. *Osborne*, 1 Str. 506.

(*g*) In *Garbutt* v. *Watson*, 5 B. & A. 614, Abbott, C. J., distinguished the case from *Towers* v. *Osborne*, observing, that in the latter "the chariot, which was ordered to be made, would never but for that order have had any existence."

(*h*) *Groves* v. *Buck*, 3 M. & S. 178.

(*i*) *Garbutt* v. *Watson*, 5 B. & A. 613.

(*k*) See *post*, of AUCTIONS, Chap. v.

whether sales of goods by auction were within the statute(*l*); as it was thought, that the publicity of the sale was sufficient to provide against fraud. But it is now determined that they are(*m*). A separate contract arises for each lot(*n*); therefore, where several lots are knocked down to one bidder, if they do not individually exceed £10, although the amount of the whole purchase may be much greater, the statute is not applicable. A different rule prevails in the case of a private contract, for the purchase of several articles at the same time and place. Where a person entered a shop, and bargained for several things, none of which singly were worth £10, but the whole value amounted to £70, it was held to be one entire contract, and void because not reduced to writing(*o*).

Sales of stock. It is said that a sale of stock is within the statute(*p*), though this has been doubted(*q*), because there can be no actual delivery. Stock.

(*l*) *Simon* v. *Motivos* (or *Metivier*), 3 Burr. 1921; *Hinde* v. *Whitehouse*, 7 East, 558.

(*m*) *Kenworthy* v. *Schofield*, 2 B. & C. 945; S. C. 4 D. & R. 556.

(*n*) *Emmerson* v. *Heelis*, 2 Taunt. 47, see the judgment of Mansfield, C. J.; *James* v. *Shore*, 1 Stark. N. P. C. 426.

(*o*) *Baldey* v. *Parker*, 2 B. & C. 37; and see *Champion* v. *Short*, 1 Campb. 53. *Post.*

(*p*) *Mussel* v. *Cooke*, Prec. Chan. 533; 2 Stark. Ev. 352, (2nd Ed.)

(*q*) *Pickering* v. *Appleby*, Com. Rep. 354; *Colt* v. *Nettervill*, 2 P. Wms. 308. [All the judges in England were equally divided on the point, *ibid.*]

Public shares.

Sales of public shares. It was ruled by Perryn, B., that a contract for the sale of shares in a canal navigation was not within the statute. An objection was taken at the trial, but on a motion to enter a nonsuit it was abandoned without argument (*r*).

Crops, &c.

Sales of crops, timber, &c. A question frequently arises, whether a contract relating to the sale of growing crops is within the 17th section, or whether it affects an interest in land within the meaning of the 4th section (*s*) of the same statute.

Growing crops.

A contract for the purchase of a growing crop of grass, to be mown and made into hay by the vendee (*t*);—a sale of growing turnips, the degree of maturity and the stipulated period of removal not being positively stated (*u*);—a sale of growing hops (*x*), or of turnips, corn, and growing crops in general (*y*), which have not arrived at maturity;—have been held to be within the 4th section.

(*r*) *Latham* v. *Barber*, 6 T. R. 67, 70.

(*s*) By the 4th section of 29 Car. II. c. 3, no action shall be brought "upon any contract or sale of lands, tenements or "hereditaments, or any interest in or concerning them," without a memorandum or note thereof written and signed by the parties, or their authorised agents. [It is to be observed, that where the contract falls within this section and is distinguished from a sale, the written note of agreement is excluded from the exemption clause of the Stamp Act, and requires an agreement stamp. See *Waddington* v. *Bristow*, 2 B. & P. 452, *post*.]

(*t*) *Crosby* v. *Wadsworth*, 6 East, 602.

(*u*) *Emmerson* v. *Heelis*, 2 Taunt. 38.

(*x*) *Waddington* v. *Bristow*, 2 B. & P. 452.

(*y*) *Falmouth* (*Earl*) v. *Thomas*, 3 Tyrw. 26; S. C. 1 Cr. & Mees. 89; see 1 Cr. & Mees. 109.

Matured crops.

But a contract for matured crops, which are to be taken up immediately, is held to pass no interest in the land; because they can derive no further advantage from the soil, and the land may be considered merely as a sort of warehouse until they can be removed. Thus, a sale of mature potatoes or other crops (*z*); or, an agreement by the incoming with the outgoing tenant to take the crops (*a*), or such an agreement, where it is made a condition of taking the farm (*b*); are not within the 4th section of the statute. So, where the *seller* was to raise the potatoes from the ground, although their growth was not complete (*c*), it was held to be strictly a contract of sale for goods, chattels and merchandise within the 17th section. So it was held, where defendant, upon condition that plaintiff would supply him with a quantity of turnip-seed, agreed to sow it in his own land, and to sell to plaintiff the whole crop of seed produced therefrom; because the thing, agreed to be delivered, would at the time of delivery be a personal chattel (*d*).

(*z*) *Parker* v. *Staniland*, 11 East, 362; *Warwick* v. *Bruce*, 2 M. & S. 205. [*Per* Lord Ellenborough, C. J., "the potatoes are the subject-matter of the sale, and whether, at the time of the sale, they are covered with earth, in a field or in a box, still it is a sale of a mere chattel;" 2 M. & S. 208.]

(*a*) *Mayfield* v. *Wadsley*, 3 B. & C. 357, 363.

(*b*) *Ib.*; see *Poulter* v. *Killingbeck*, 1 B. & P. 397.

(*c*) *Evans* v. *Roberts*, 5 B. & C. 829; S. C. 8 D. & R. 611.

(*d*) *Watts* v. *Friend*, 10 B. & C. 446.

Timber. A contract for the purchase of timber at so much per foot, was decided to be a contract of sale within the 17th section(*e*); Bayley, J. said, that the agreement was not for the growing trees, but for the produce when they should be cut down and severed from the freehold(*f*). But where the agreement is for growing trees(*g*), it seems to fall within the 4th section; as trees for the purpose of making hop-poles(*h*), or growing underwood to be felled by the purchaser(*i*).

Fixtures. It seems that fixtures, unsevered from the freehold, are not within the statute of frauds at all. They have been decided not to constitute an interest in land within the 4th section(*k*), and they cannot be recovered in an action for goods sold and delivered(*l*).

Contract to procure goods. *Contract to procure goods.* A contract to procure coals at A., and bring them to B., was held not to be a contract of sale, and therefore not within the statute(*m*). It was said, that if no coals could have been procured at A., an action

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(*e*) *Smith* v. *Surman*, 9 B. & C. 561.

(*f*) *Ib.* 568.

(*g*) See *Knowles* v. *Michel*, 13 East, 249.

(*h*) *Teal* v. *Auty*, 2 B. & B. 99. [But see 1 Ld. Raym. 182, *per* Treby, C. J., and Powell, J.]

(*i*) *Scorell* v. *Boxall*, 1 Y. & J. 396.

(*k*) *Hallen* v. *Runder*, 1 Cr. M. & Ros. 266.

(*l*) *Lee* v. *Risdon*, 7 Taunt. 188; *post.*

(*m*) *Cobbold* v. *Caston*, 1 Bingh. 399; S. C. 8 B. Moore, 456; 1 C. & P. 51.

could not have been maintained for non-delivery. But the mere additional expense of carriage of goods, does not make it a mixed contract distinguishable from sale(*n*).

SECTION II.— *What Delivery and Acceptance of the goods are sufficient to satisfy the Statute.*

The first exception made by the statute is, where "the buyer shall accept part of the goods "so sold, and actually receive the same."

Sufficient actual acceptance.

Actual Delivery and Acceptance of part.—The voluntary reception of the goods by the buyer, is made essential by the words of the statute; therefore a delivery alone on the part of the seller is insufficient, if the purchaser at the time refuse to accept. Defendant went to the shop of the plaintiff, and contracted to purchase several articles, some of which he marked with a pencil, others were measured in his presence, and the whole were sent to his house according to his order, but he refused to accept them; it was held to be no delivery and acceptance to satisfy the statute (*a*). So, where the vendee opened the bale of goods which had been sent to his order, but returned

(*n*) *Astey* v. *Emery*, 4 M. & S. 262.

(*a*) *Baldey* v. *Parker*, 2 B. & C. 37; and see *Nicholle* v. *Plume*, 1 C. & P. 272.

them with a letter, saying that they were not worth the price charged, it was held to be no acceptance (*b*). So, where the defendant bargained with the plaintiff's agent, for a quantity of cream of tartar and lacdye, saying that he would accept them if the price of the lacdye were diminished; the whole was sent, but he accepted the cream of tartar only, tendering the price for it, and returned the lacdye; it was held, that there had been no acceptance of the latter (*c*).

Where the purchaser of a quantity of balsam sent a person with baskets to receive part, such acceptance was held to take the case out of the statute as to the whole quantity(*d*). So it is, where a portion of the goods has been received by way of sample, provided that such sample was considered at the time part of the thing sold, and that the

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(*b*) *Kent* v. *Huskisson*, 3 B. & P. 233.

(*c*) *Price* v. *Lea*, 1 B. & C. 156; S. C. 2 D. & R. 295.

(*d*) *Descard* v. *Bond*, cited 2 Stark. Ev. 354. [But see *Thompson* v. *Maceroni*, 3 B. & C. 1; S. C. 4 D. & R. 619; it does not appear clearly from the report, on what ground the latter case was decided. The defendant contracted for goods to be made to his order, to the value of £144, and took away part to the amount of £2. 10*s*.: it was held insufficient to satisfy the statute as to the residue. *Qu.* whether it was on the ground that the contract was severed, (see *Bragg* v. *Cole*, 6 B. Moore, 114); or, that the property in a chattel made to order does not vest in the purchaser until completion and delivery; see *Mucklow* v. *Mangles*, 1 Taunt. 318].

bulk of the commodity was thereby actually diminished (*e*). But it is no acceptance, if the sample formed no part of the bulk contracted for (*f*).

When acceptance of part is insufficient.

Actual acceptance of part or of the whole may be insufficient, if there are grounds for presuming, that the vendor did not intend at the time to conclude the bargain, and part absolutely with the property. Thus, at an auction, where by the conditions 30 per cent. deposit was required to be paid down, defendant being the highest bidder for a lot of articles knocked down, took them into his hand, and retained them for a few minutes, but being dissatisfied returned them without paying the deposit, and refused to complete the purchase; the Court held, that it was not to be presumed that the vendor intended, contrary to the condition, to part with the property until the deposit was paid(*g*). It has been said, that there can be no acceptance within the statute, as long as the buyer has the right of objecting to the quantity or the quality of the goods (*h*), or as long as the vendor retains his lien (*i*). Actual acceptance of part of a quantity

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(*e*) *Hinde* v. *Whitehouse*, 7 East, 558; *Klinitz* v. *Surry*, 5 Esp. 267.

(*f*) *Talver* v. *West*, Holt, N. P. C. 178, *per Gibbs*, C. J. *Cooper* v. *Elston*, 7 T. R. 16.

(*g*) *Phillips* v. *Bistolli*, 2 B. & C. 511.

(*h*) *Vid. per Abbott*, C. J., 3 B. & A. 323, and 5 B. & A. 559.

(*i*) See judgments of *Abbott*, C. J. and *Bayley*, J., 5 B. & A. 859, and in *Smith* v. *Surman*, 9 B. & C. 561.

of goods contracted for, will not be effectual to take the residue out of the statute, if the circumstances be such as to destroy the entirety of the contract (*k*).

Constructive acceptance.

Constructive Delivery and Acceptance.—Where the goods are ponderous and incapable of being handed from one to another, there need not be an actual delivery, but it may be effected by that which is tantamount, such as the delivery of the key of a warehouse in which the goods are lodged, or by the delivery of other *indicia* of property (*l*). Therefore it was held, that after a verbal bargain and sale of a stack of hay between two parties on the spot, the circumstance of part being taken away by a third person to whom the vendee had sold it, though such taking was against the vendee's approbation, was sufficient to warrant the jury in finding a delivery and acceptance by the vendee (*m*). In another case, the defendant undertook to purchase 20 hogsheads of sugar from the plaintiff; four were filled up, delivered, and accepted; defendant afterwards, being informed that the other sixteen were ready, promised to take them as soon as possible; it was held, that this was a sufficient appropriation to vest the pro-

(*k*) See *Price* v. *Lea*, 1 B. & C. 156; *Thompson* v. *Maceroni*, 3 B. & C. 1; *Bragg* v. *Cole*, 6 B. Moore, 114.

(*l*) *Per* Lord *Kenyon*, C. J., 1 East, 195; 1 Atk. 171.

(*m*) *Chaplin* v. *Rogers*, 1 East, 192.

perty in the residue in defendant (*n*). But the mere measuring out and setting aside the commodity bargained for, without an assent to the appropriation on the part of the purchaser, will not be equivalent to acceptance. Defendant agreed to purchase twelve bushels of tares, requesting that they might remain in vendor's possession until called for; and they were accordingly measured and set apart; it was held to be no acceptance (*o*).

Several acts on the part of the vendee have been decided to amount to implied acceptance, even where the chattel is not ponderous or difficult of removal. Defendant agreed to buy two horses, but, having neither servant nor stable, directed plaintiff to keep them at livery for him, and the plaintiff accordingly removed them from his sale-stable to another; this was held to amount to delivery and acceptance (*p*). So, it was held to be properly left to the jury, where defendant, having contracted for the purchase of a horse, offered to a third party to resell it as his own (*q*). It was ruled by Lord Ellenborough, that where the purchaser writes his name upon the goods bargained for, with intent to denote that he has appropriated

(*n*) *Rohde* v. *Thwaites*, 6 B. & C. 388.

(*o*) *Howe* v. *Palmer*, 3 B. & A. 321. [In *Simon* v. *Metivier*, 1 Bl. Rep. 599, the Court were inclined to lay some stress on the circumstance of defendant coming to see the goods weighed].

(*p*) *Elmore* v. *Stone*, 1 Taunt. 458.

(*q*) *Blenkinsop* v. *Clayton*, 7 Taunt. 597.

them, it is a sufficient acceptance(*r*). The same learned judge decided similarly, where on a contract for the purchase of several pipes of wine, the plaintiff's initials were at his request marked on the casks by the clerk, and the plaintiff took with him the gauge numbers(*s*). It is doubtful, however, whether these cases can be supported(*t*).

When insufficient.

But other acts, although apparently furnishing some grounds for presuming ownership, have been held insufficient. Where the plaintiffs, being farriers, sold a horse by verbal contract, but no time was specified for payment, and at defendant's request the horse remained for a certain period with the vendors, and was afterwards sent to grass, by the direction of defendant, in the name of the *vendors*, it was held to be no acceptance(*u*). The Court, however, expressed an opinion that it would have been otherwise, if the horse had been sent in the defendant's name(*x*). Again, there was held to be no acceptance of a horse, which had remained all the time in the vendor's possession, although defendant had rode it out, and given directions about its treatment(*y*). In a recent case, where

(*r*) *Hodgson* v. *Le Bret*, 1 Campb. 233.

(*s*) *Anderson* v. *Scott*, 1 Campb. 235, n.

(*t*) See *Baldey* v. *Parker*, 2 B. & C. 37. In *Proctor* v. *Jones*, 2 C. & P. 532, Best, C. J., dissents from the doctrine of Lord Ellenborough. See 8 B. & C. 619.

(*u*) *Carter* v. *Toussaint*, 5 B. & A. 855; S. C. 1 D. & R. 515.

(*x*) 5 B. & A. 858, 860.

(*y*) *Tempest* v. *Fitzgerald*, 3 B. & A. 680.

the defendant ordered a waggon to be made, and purchased the iron-work and a tilt from another person, who assisted the plaintiff's servants in fixing them on, it was held to be no acceptance (*z*).

Delivery to an Agent.—Delivery to a carrier, or other agent, expressly or impliedly authorized by the vendee, has been held to amount to an actual acceptance by vendee; but there must be sufficient ground for presuming the unequivocal assent of the principal, since, even if the delivery be to the purchaser himself, it has been stated above that an immediate refusal on his part will render the delivery nugatory (*a*). Perhaps some of the earlier decisions proceeded too far, in presuming the acceptance by a carrier to be the acceptance of the principal. Acceptance by agent.

The delivery of a hogshead of gin to the master of a ship, to be conveyed to the purchaser, was held sufficient, the purchaser having been in the habit of receiving consignments of spirits by such conveyance (*b*). But it was decided not to be sufficient, merely to send the goods to a quay as ordered by the defendant, where no particular

(*z*) *Maberly* v. *Sheppard*, 10 Bingh. 99; S. C. 3 M. & Scott, 436.

(*a*) *Supra*, p. 57; see *Kent* v. *Huskisson*, 3 B. & P. 233.

(*b*) *Hart* v. *Sattley*, 3 Campb. 528, *per* Chambre, J. And see *Dutton* v. *Solomonson*, 3 B. & P. 582; *Dawes* v. *Peck*, 8 T. R. 330; *Buckman* v. *Levi*, 3 Campb. 414; *Vale* v. *Bayle*, Cowp. 294.

carrier had been named(*c*). Some of the more recent decisions seem to indicate the intention of the Courts, not to push to any greater length the presumption of assent, on the part of the vendee, to a delivery into the possession of a third party. Thus, where the goods had been delivered to a wharfinger to be forwarded to the purchaser in the customary manner, the property was held not to be transferred(*d*); and the same was decided, where defendant had even appointed a particular boat, and desired a third party to inspect the loading, but did not himself exercise any act of ownership(*e*). In a very recent case, it was declared to be no sufficient delivery and acceptance of goods contracted for, that they were shipped on board a vessel chartered by the purchaser(*f*). Where the goods are in the custody of a third party, a written order, directing the bailee to deliver them to the purchaser, is a sufficient delivery(*g*). But it is absolutely necessary that the bailee should consent to hold them as agent for the purchaser(*h*).

(*c*) *Anderson* v. *Hodgson*, 5 Price, 630; and see *Snee* v. *Prescott*, 1 Atk. 248.

(*d*) *Hanson* v. *Armitage*, 5 B. & A. 557.

(*e*) *Astey* v. *Emery*, 4 M. & S. 262. [This case and the preceding seem scarcely reconcilable with the cases cited above.]

(*f*) *Acebal* v. *Levy*, 10 Bingh. 376.

(*g*) *Searle* v. *Keeves*, 2 Esp. 598.

(*h*) *Bentall* v. *Burn*, 3 B. & C. 423; S. C. 5 D. & R. 284.

SECTION III.—*What is held to amount to Earnest and part Payment.*

The second exception made by the statute is, where the buyer shall "give something in earnest "to bind the bargain, or in part payment."

Very few questions arise on the construction of this clause. It was decided that there must be an actual transfer of something valuable, to constitute a "giving something in earnest" within the statute. Thus, a custom which prevails in the north of England, of *striking the bargain*, by the seller (or his agent) drawing the edge of a shilling over the hand of the purchaser (*a*), was held not to be sufficient (*b*). Earnest.

The effect of giving earnest seems to be to alter the property, though it has been said that it merely binds the bargain. Lord Holt thus lays down the law:—"Notwithstanding the earnest, the money must be paid upon fetching away the goods, because no other time for payment is appointed. Earnest *only binds the bargain*, and gives the party a right to demand; but a demand without payment of the money is void. After earnest given, the vendor cannot sell the goods to another Effect of earnest.

(*a*) Or, as it is stated in the marginal abstract, "the purchaser drawing the coin over the hand of the seller,"—which seems to be the correct reading.

(*b*) *Blenkinsop* v. *Clayton*, 7 Taunt. 597.

without a default in the vendee; and, therefore, if the vendee does not come and pay and take away the goods in convenient time, the agreement is dissolved, and he is at liberty to sell them to any other person (*c*)." But this doctrine seems to be contradicted by the following decision. The plaintiff agreed to give his horse and the sum of two guineas for a horse of the defendant's, and the latter paid a halfpenny by way of earnest to make the agreement more firm and binding; it was held, that the plaintiff might recover without alleging any performance or offer of performance of his own part of the contract (*d*). Buller, J., said, "the payment of the halfpenny vested the property of the colt in the defendant, and therefore it was unnecessary for the plaintiff to show that he had tendered the colt to the defendant (*e*)."

Part payment.

Where a part payment has been made, it must have been given as part of the whole consideration: it seems that, if the contract be severed, the part payment will not have the effect of taking the residue out of the statute (*f*). The giving a bill of exchange or promissory note, in part payment,

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(*c*) *Langfort* v. *Administratrix of Tiler*, 1 Salk. 113; S. C. 6 Mod. 162; Bull. N. P. 50.

(*d*) *Buch* v. *Owen*, 5 T. R. 409.

(*e*) Id. 410. And see 2 Bl. Comm. 448.

(*f*) *Vid. supra*, p. 60, in the preceding section, as to acceptance of part of goods sold where the entirety of the contract is destroyed.

would satisfy the statute; as such delivery is held sufficient to support a plea of payment in assumpsit, unless the bill or note have been dishonoured (*g*).

SECTION IV.—*Of the Note or Memorandum required by the Statute.*

The last exception made by the statute is, where "some note or memorandum in writing of the said "bargain is made and signed by the parties to be "charged by such contract, or their agents there-"unto lawfully authorized (*a*)."

Form of memorandum.

Of the Form of the Note or Memorandum.—The written note or memorandum is not required to be one entire document; it is sufficient if the terms of the contract can be ascertained by connecting several different writings, and a written instrument, which is conformable to the statute, may by reference include the contents of another which is

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(*g*) *Kearslake* v. *Morgan*, 5 T. R. 513. See Chit. Bills, 97, (6th edit.)—*Post*.

(*a*) The corresponding clause of the 4th section of the Statute of Frauds is similar in substance. The words are, "unless some "memorandum or note thereof shall be in writing, and signed by "the party to be charged therewith, or some other person there-"unto lawfully authorized." From the analogy between the two clauses, the cases decided on the 4th section may be cited, since they are in general equally applicable to the 17th section.

not (*b*). Thus, a letter written by the vendor may be connected with a bill of parcels in which the vendor's name is printed, so as to take the case out of the statute (*c*). So it was held, that an order for goods written by the seller or his agent in a book of the purchaser's, though not alluding to the purchaser by name, might be connected with a letter in which the purchaser's name was mentioned, written by the seller to his agent, and with a letter from the purchaser to the seller calling upon the latter to execute the order (*d*). So, a correspondence which passed between the vendee and the agent of the vendor, was allowed to be connected with an appraisement and inventory (*e*). The two following letters were held sufficient to form together a memorandum of the contract. A letter from the vendee to the vendors to the following effect: "I hereby give you notice that the corn you delivered to me, in part performance of the contract, is of so bad a quality, that I cannot sell it, or make it into saleable bread: the sacks of flour are at my shop and

(*b*) *Brodie* v. *St. Paul*, 1 Ves. Jun. 326; *Stead* v. *Liddard*, 1 Bingh. 196.

(*c*) *Saunderson* v. *Jackson*, 2 B. & P. 238. [And see the following cases decided on the 4th section; *Clinan* v. *Cooke*, 1 Sch. & Lef. 22; *Gordon* v. *Trevelyan*, 1 Price, 64; *Seagood* v. *Meale*, Prec. Chan. 560; *Clerk* v. *Wright*, 1 Atk. 12; *Whaley* v. *Bagenal*, 1 Bro. P. C. 345.].

(*d*) *Allen* v. *Bennett*, 3 Taunt. 169.

(*e*) *Hemming* v. *Perry*, 2 M. & Payne, 375.

at your risk." To which the vendors replied by their attorney: "Messrs. L. and L. consider they have performed their contract with you as far as it has gone, and are ready to complete the remainder: unless the flour is paid for within one month, proceedings will be taken against you without further notice." In an action for the non-fulfilment of the contract, the vendee recovered (*f*). But a defective memorandum was held not to be aided by a subsequent letter from the defendant, in which he recognized the order, but insisted that he was not liable on the ground that the vendors had made default in the stipulated time (*g*). And there was held to be no sufficient memorandum made out by coupling an invoice, mentioning the seller and purchaser, with a letter from the seller acknowledging the receipt of the invoice, but declaring that the goods had been improperly delayed, and that, if they did not arrive within a certain time, he should procure others elsewhere (*h*).

The Courts are very jealous in admitting parol evidence to support the connection between documents otherwise distinct (*i*). The vendor was not

(*f*) *Jackson* v. *Lowe*, 1 Bingh. 9.

(*g*) *Cooper* v. *Smith*, 15 East, 103.

(*h*) *Richards* v. *Porter*, 6 B. & C. 437; [acknowledging *Cooper* v. *Smith*].

(*i*) *Boydell* v. *Drummond*, 11 East, 142; *Boys* v. *Ayerst*, 6 Madd. 316; *Tawney* v. *Crowther*, 1 Bro. P. C. 161, 318. [But a

Parol evidence inadmissible to connect documents.

allowed to prove, by the testimony of the person who took the order, that there was no stipulation in the contract regarding the time of delivery (*k*). Nor would parol evidence be admissible to substitute a contract different in effect, such as the waiver by vendee of a material part of the agreement (*l*). But parol evidence was received, to establish the identity of the hand-writing in different papers (*m*).

Of the Contents of the Note or Memorandum.

Contents of memorandum.

The names of both the parties must appear somewhere in the note or memorandum, or in some other writing clearly referred to; therefore, where

Names of the parties.

the name of the plaintiff (the buyer) was not mentioned at all, he was nonsuited (*n*).

Price stipulated.

Where a specific price has been agreed upon, it must be stated in the note or memorandum of the contract; because, if it were admissible to prove by parol evidence the stipulated amount of payment, there would obviously be room for much of the mischief which the statute was intended to obviate. Where defendant had written, agreeing to take a horse if he could be proved to be of a speci-

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parol promise afterwards recognized in writing is sufficient, *Longfellow* v. *Williams*, Peake's Add. Ca. 225.]

(*k*) *Cooper* v. *Smith*, 15 East, 103.

(*l*) *Goss* v. *Lord Nugent*, 5 B. & Ad. 58.—*Post.*

(*m*) *Clinan* v. *Cooke*, 1 Sch. & Lef. 22.

(*n*) *Champion* v. *Plummer*, 1 N. R. 252; S. C. 5 Esp. 240. [And see on the 4th section *Wheeler* v. *Collier*, 1 M. & M. 123; *Charleswood* v. *D. of Bedford*, 1 Atk. 497.]

fied age, the writing was held insufficient, because it made no mention of the *price* (*x*). It had appeared in evidence that there was a stipulated sum, and the Court said that, in such case, the price was a material part of the bargain. This doctrine was confirmed by a recent case (*y*). But if no price has been specified by the parties, it is no objection that the note is silent on that head; a reasonable price will be presumed to have been intended. Were the law otherwise, it would be found highly inconvenient where goods are made to order, as the price can scarcely be ascertained until they are completed. The distinction has been very recently recognized. Defendant ordered a landaulet to be built by a certain day, and in a written memorandum gave detailed directions respecting the appointments. The carriage was completed accordingly, but the defendant refused to accept it, declaring the price demanded to be exorbitant, and objecting to the sufficiency of the memorandum on the ground that no price was specified. The Court overruled the objection, on the ground that there was no stipulation as to price in the original contract (*z*).

(*x*) *Elmore* v. *Kingscote*, 5 B. & C. 583. And see *Kain* v. *Old*, 2 B. & C. 627.

(*y*) *Acebal* v. *Levy*, 10 Bingh. 376; S. C. 4 M. & Scott, 340.

(*z*) *Hoadly* v. *M'Laine*, 10 Bingh. 482; S. C. 4 M. & Scott, 217. *Tindal*, C. J. observed, that the 7th section of 9 Geo. IV. c. 14 substitutes the word *value*, for the word *price* used in the 17th

Consideration.

It is not necessary that any consideration for the promise should appear on the face of the note or memorandum; or, rather, the mutual obligation will be always presumed to form the consideration (*a*).

Of the Signature of the Parties.

Signature of party.

The note or memorandum of the contract must be signed, by the party to be charged, or his lawfully authorized agent. It has been stated (*b*), that the names of both the contracting parties must appear somewhere in the note; it is not however necessary that both should sign. If the defendant has signed, he cannot object to the sufficiency of the writing on the ground that the signature of the plaintiff does not appear, and that the contract could not be enforced against the latter (*c*); because the words of the statute are, "signed by the parties *to be charged*."

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section of the Statute of Frauds, "so that, where the parties have omitted to fix a price, it may be open to a jury to ascertain the value." 10 Bingh. 487.

(*a*) *Egerton* v. *Mathews*, 6 East. 307. [There is a distinction taken in this respect between the 4th and 17th sections; in the latter section, the word used is *bargain;* in the former, *agreement;* and it is held that a memorandum, stating the terms of an *agreement* under the 4th section, could not be complete, if the consideration were omitted on the face of it. See *Wain* v. *Walters*, 5 East, 10.—*Post.*]

(*b*) *Supra*, p. 70.

(*c*) *Allen* v. *Bennet*, 3 Taunt. 169. [This is always the rule in Equity. See Sugd. Vend. p. 85 (9th ed.); *Boys* v. *Ayerst*, 6 Madd. 316.]

It is immaterial in what part of the note the signature appears, whether at the beginning or the end. "I, A. B. agree to sell, &c." (*d*), or in the third person, "Mr. A. B. has agreed" (*e*), will be sufficient without further signature. It was held in one case, that the *printing* of the vendor's name was sufficient to bind him, the words of the statute being *making or signing* (*f*). There were, however, other circumstances in the case to connect the bill of parcels, in which the printed name appeared, with a letter subsequently written by the vendor. However, a printed name subsequently recognized will undoubtedly be sufficient; as where the name of the vendor was printed in the bill of parcels, and a blank left in the same paper was afterwards filled up by the vendor with the purchaser's name (*g*). It appears that the signature would be sufficient if written with a pencil; this was held good in the indorsement of a promissory

(*d*) *Knight* v. *Crockford*, 1 Esp. 190.

(*e*) *Propert* v *Parker*, 1 Russ. & M. 625. [Similarly as to an agreement for the purchase of an estate. See *Ogilvie* v. *Foljambe*, 3 Merivale, 53; *Morison* v. *Turnour*, 18 Ves. Jun. 175. A will was held valid, where the testator's name was written by himself in the body of the document, *Lemayne* v. *Stanley*, 3 Lev. 1.]

(*f*) *Saunderson* v. *Jackson*, 2 B. & P. 238.

(*g*) *Schneider* v. *Norris*, 2 M. & S. 286. [But *qu.* whether a printed name of itself is sufficient. Dampier, J. said, that in *Saunderson* v. *Jackson* the letter alone, with which the bill of parcels was connected, took the case out of the statute; *ib.* 290.]

note (*h*). The initial letter of the surname would not be considered a sufficient signature (*i*).

Of the Signature by an Agent.

Signature of agent.

The agent empowered to sign need not be authorized in writing (*k*); and if the act of an unauthorized person be subsequently ratified, he is an agent within the statute, on the principle of the maxim, *omnis ratihabitio retrotrahitur, ac mandato priori æquiparatur* (*l*). It is frequently a question for the jury whether, under the circumstances, there is sufficient evidence of authority given by the defendant to the alleged agent (*m*). The authority may be orally countermanded at any time before it is actually executed (*n*), even where the broker

Authority countermandable.

(*h*) *Geary* v. *Physic*, 5 B. & C. 234. [See *Jeffery* v. *Walton*, 1 Stark. N. P. C. 267. Of a guaranty written in pencil, *Philips* v. *Astling*, 2 Taunt. 206.]

(*i*) In *Hubert* v. *Moreau*, 2 C. & P. 528, such signature was held insufficient to charge a bankrupt on his promise; which must be in writing, and signed, under 6 Geo. IV. c. 16, s. 130. But see 1 Campb. 513.

(*k*) See 4 Bingh. 727; *Coles* v. *Trecothick*, 9 Ves. Jun. 249, a. *Fairbrother* v. *Prattent*, 1 Dan. 67. [Neither the 4th nor the 17th sections of the statute require a written authority; but the 3d section, which relates to Assignments, Surrenders, and Grants, makes writing necessary.]

(*l*) *M'Lean* v. *Dunn*, 4 Bingh. 722.

(*m*) *Chapman* v. *Partridge*, 5 Esp. 256.

(*n*) *Farmer* v. *Robinson*, 2 Campb. 339, n. And see 5 Esp. 257; *Bristow* v. *Taylor*, 2 Stark. N. P. C. 50; *Warwick* v. *Slade*, 3 Campb. 127.

or other agent has previously entered into a verbal contract with the vendee. (*o*).

An auctioneer is a lawfully authorized agent within the meaning of the Statute of Frauds, both for the vendor and the vendee (*p*). This is now well established, though the propriety of the doctrine has been questioned (*q*). It was held sufficient, where the auctioneer wrote the initials of the name of the purchaser's agent opposite the lots in the catalogue, the agent having been authorized to make the purchase (*r*). The name of the vendee-principal need not appear; it is sufficient if the auctioneer writes down the name of the acknowledged agent (*s*). But if the name is written opposite to the lots in the catalogue, the conditions of sale must be annexed to the catalogue, or clearly referred to, in order to connect them, as part of the contract (*t*). It was held to be insufficient, that the conditions had been read aloud before the biddings, and that they remained in the room during the sale (*u*). Auctioneer.

(*o*) 2 Campb. 339, n.

(*p*) *Simon* v. *Metivier*, 3 Burr. 1921; S. C. 1 Bl. Rep. 599; *Emmerson* v. *Heelis*, 2 Taunt. 38; *Hinde* v. *Whitehouse*, 7 East, 558. And *vid. infra*, AUCTION, Chap. v.

(*q*) See 2 Taunt. 45.

(*r*) *Phillimore* v. *Barry*, 1 Campb. 513. As to the purchase of lands, see *Kemeys* v. *Proctor*, 1 Jac. & W. 350; *White* v. *Proctor*, 4 Taunt. 209.]

(*s*) *Kenworthy* v. *Schofield*, 2 B. & C. 945. See 1 Campb. 513.

(*t*) Ibid. And see 7 East, 569.

(*u*) *Kenworthy* v. *Schofield*, 2 B. & C. 945.]

Broker.

A broker is an agent for both parties within the Statute of Frauds (*x*). An entry made in his books of the sale of goods, and signed by him, is a memorandum to bind the contract (*y*); and it is decided to be sufficient, even if the entry be not signed by him, provided that *the bought and sold notes* (*z*) sent to the parties be duly signed, and correspond with each other (*a*). But if the notes materially differ from each other, there is no valid contract (*b*). It was held, that a material alteration made in the sale-note after the bargain, by the broker, at the vendor's suggestion, without the purchaser's consent, precluded the vendor from availing himself of the instrument to prove the contract (*c*). It is

Bought and sold notes.

(*x*) *Rucker* v. *Cammeyer*, 1 Esp. 105; *Heymann* v. *Neale*, 2 Campb. 337; *Cumming* v. *Roebuck*, Holt, N. P. C. 172; *Thornton* v. *Meux*, 1 M. & Malk. 43; *Anon.* Lofft, 330.

(*y*) *Heyman* v. *Neale*, 2 Campb. 337; *Gale* v. *Wells*, 1 C. & P. 388.

(*z*) Paper writings, copied by the broker from the entry in his book, and signed by him, are commonly termed "bought and sold notes." It was said by Lord Ellenborough, that these notes are not sent to the parties for their approbation, but to inform them of the terms of the contract. See 2 Campb. 338. But the better opinion seems to be that the sale-notes themselves, and not the entry in the broker's book, evidence the contract. See Holt, N. P. C. 173; 1 M. & Malk. 44; 6 B. & C. 122; *Hawes* v. *Forster*, 1 M. & Rob. 374.

(*a*) *Goom* v. *Aflalo*, 6 B. & C. 117.

(*b*) *Cumming* v. *Roebuck*, Holt, N. P. C. 172; *Thornton* v. *Kempster*, 5 Taunt. 786; S. C. 1 Marsh. 355; *Grant* v. *Fletcher*, 5 B. & C. 436; S. C. 8 D. & R. 59.

(*c*) *Powell* v. *Divett*, 15 East, 29.

sufficient, however, if the plaintiff produce the sale-note on which he intends to rely in proof of the contract, and if the defendant objects that there is a variance between the bought and sold notes, he ought to prove it by producing the other (*d*). A mere inaccuracy in the description of the names of the parties will not vitiate the contract, where the mistake has not prejudiced either (*e*). Nor can the vendee avail himself of a variance in the sale-note delivered to him by the broker, when he has himself signed the note delivered to the vendor (*f*). Nor can he object to the sufficiency of the sale-note as a memorandum within the statute, though he may not have assented at the time, if he has ratified the broker's authority after the sale (*g*).

Mistake in sale-note.

Evidence is admissible to show that, by a particular custom of trade, the authority of the broker expires on the day on which it is given (*h*). And Lord Ellenborough ruled that a seller is at liberty, by the usage of trade, to object within a reasonable time to the sufficiency of a purchaser who gives a bill of exchange in payment (*i*).

(*d*) *Hawes* v. *Forster*, 1 M. & Rob. 368.

(*e*) *Mitchell* v. *Lapage*, Holt, N. P. C. 253.

(*f*) *Rowe* v. *Osborne*, 1 Stark. N. P. C. 140.

(*g*) *Soames* v. *Spencer*, 1 D. & R. 32. See 4 Bingh. 722.

(*h*) *Dickenson* v. *Lilwall*, 1 Stark. N. P. C. 128.

(*i*) *Hodgson* v. *Davis*, 2 Camp. 530. [But five days were considered an unreasonable time.]

Signature of one party or his agent cannot bind the other.

Neither of the parties (*k*) to the contract, though expressly authorized, nor any person who is agent for one side only (*l*), can be an agent for the other party so as to bind him by his signature. Therefore, where the action was brought against the vendee in the name of the auctioneer, who had written defendant's name, by his authority, opposite to the lot purchased, the signature was decided to be insufficient (*m*); though it would have been good, had the action been brought in the name of the vendor-principal. But, where the vendee's name was signed in the sale-book by the clerk of the auctioneer, it was held that the case was distinguishable, and that the auctioneer could recover in an action against the vendee, as the clerk was not identified with his principal (*n*) Upon the same ground, it would seem that the signature of the clerk of an agent will not be sufficient as between the original contracting parties (*o*).

(*k*) *Wright* v. *Dannah*, 2 Campb. 203.

(*l*) *Cooper* v. *Smith*, 15 East, 103; *Dixon* v. *Broomfield*, 2 Chit. Rep. 205.

(*m*) *Farebrother* v. *Simmons*, 5 B. & A. 333; *Rayner* v. *Linthorne*, 2 C. & P. 124; S. C. 1 Ry. & M. 325.

(*n*) *Bird* v. *Boulter*, 4 B. & Adol. 443.

(*o*) *Ibid.* [See on this point, as to sales of estates, *Blore* v. *Sutton*, 3 Mer. 237; *Coles* v. *Trecothick*, 9 Ves. Jun. 235; *Gosbell* v. *Archer*, 4 Nev. & Man. 485. But *contra*, *per* Hullock, B., in *Henderson* v. *Barnewall*, 1 Y. & J. 389.]

PART II.

OF STATUTES RELATING TO SALES OF SHIPS.

The former statutes, relating to shipping and navigation, have been repealed, and the whole law has been consolidated and amended, by certain Acts passed in the reign of his late Majesty (*a*).

Of Transfer generally.

Transfer of property in ship must be by bill of sale, &c.

It is enacted, that "when and so often as the "property in any ship or vessel or any part thereof, "belonging to any of his majesty's subjects, shall, "after registry thereof, be sold to any other of his "majesty's subjects, the same shall be transferred "by bill of sale, or other instrument in writing con- "taining a recital of the certificate of registry (*b*) of "such ship or vessel, or the principal contents "thereof, otherwise such transfer shall not be valid "or effectual for any purpose whatever either in "law or equity (*c*)." And the bill of sale, or other written instrument, must be produced to the officers

(*a*) See Lord Tenterden's Treatise on Shipping, 5th ed. by Mr. Abbott. [An act however has been passed since the publication of that edition, viz. 3 & 4 Will. IV. c. 55, intituled "An Act for the Registering of British Vessels;" which does not however expressly repeal any former acts, but consolidates and amends the law.]

(*b*) Of the form of the certificate of registry, see 3 & 4 Will. IV. c. 55, s. 2.

(*c*) 3 & 4 Will. IV. c. 55, s. 31; see 6 Geo. IV. c. 110, s. 31; *Rolleston* v. *Hibbert*, 3 T. R. 406.

of customs at the port of registry or of intended registry, and the particulars of the instrument must be entered by them in the book of registry or of intended registry (*d*). Whenever any owner transfers his share or shares in the vessel, the same must be registered *de novo* (*e*). The registry *de novo*, however, need not be made, provided that the officers of customs at the port of registry indorse (*f*) the particulars of the bill on the certificate of registry, and give notice thereof to the commissioners of customs (*g*). The officers of customs at other ports than those to which the vessel belongs, may indorse on the certificate of registry the transfer mentioned in the bill of sale, after giving notice to the officers at the port of registry (*h*). Where vessels, or shares, are sold in the absence of the owners, by their known agents or correspondents, without formal powers;—or, where from accidental circumstances bills of sale cannot be produced, or proved to have been executed;—the commissioners may, upon proof of fair dealing, allow the registry *de novo*, or

Sale without formal powers.

(*d*) 3 & 4 Will. IV. c. 55, s. 34; 6 Geo. IV. c. 110, s. 37.

(*e*) 3 & 4 Will. IV. c. 55, s. 11; 7 Geo. IV. c. 48, s. 26.

(*f*) This was formerly done by the vendor. [See the form of indorsement, 3 & 4 Will. IV. c. 55, s. 34.]

(*g*) 3 & 4 Will. IV. c. 55, s. 34; 6 Geo. IV. c. 110, s. 40. But, upon a change of property in the vessel, a registry *de novo* may always be granted, if desired, even in cases where the act does not expressly require it; 3 & 4 Will. IV. c. 55, s. 39.

(*h*) 3 & 4 Will. IV. c. 55, s. 37; 6 Geo. IV. c. 110, s. 40.

indorsement (as the case may be), in order to effectuate the transfer; provided the parties give sufficient security, to produce within a reasonable time legal powers, or to abide future claims (*i*).

It was formerly necessary to recite accurately the certificate of registry in the bill of sale, and any error in the recital, except a mistake apparent upon the face of it (*k*), vitiated the instrument (*l*). But it is now sufficient to recite the principal contents, and it is declared that the bill of sale shall not be void by error in the recital, provided the identity of the ship can be established (*m*). Even under the old acts it was decided, that an omission made by the public officers would not invalidate the sale (*n*).

A recital of the certificate of registry is now not necessary to the validity of an *executory* contract or agreement for the transfer (*o*), as was formerly expressly required (*p*); nor is an indorsement of such contract on the certificate now requisite, though formerly it was held so (*q*). Executory contract.

(*i*) 3 & 4 Will. IV. c. 55, s. 41; 6 Geo. IV. c. 110, s. 44.

(*k*) *Rolleston* v. *Smith*, 4 T. R. 161; Abb. Shipp. p. 51.

(*l*) *Westerdall* v. *Dale*, 7 T. R. 306.

(*m*) 3 & 4 Will. IV. c. 55, s. 31; 6 Geo. IV. c. 110, s. 37.

(*n*) *Ratchford* v. *Meadows*, 3 Esp. 69; *Heath* v. *Hubbard*, 4 East, 110; Abb. Shipp. p. 52.

(*o*) Abb. Shipp. p. 50.

(*p*) 34 Geo. III. c. 68, s. 14.

(*q*) *Mortimer* v. *Fleming*, 4 B. & C. 120.

Delivery of possession necessary.

Although the property in a ship is evidenced by the bill of sale, or other instrument(*r*), the delivery of actual possession is necessary to give a complete title to the purchaser, and should always be made when practicable. As between vendor and vendee the transfer indeed is complete by payment of the price without delivery, but if the vendor, while permitted to remain in possession and to act as owner, become bankrupt, the property will pass to the assignees(*s*). If however the purchaser takes possession at any time before the bankruptcy, he will be deemed the owner, though the seller remained in possession during the intermediate time(*t*).

Exceptions.

There are cases where actual delivery of possession is impracticable, and will therefore be dispensed with:

First, in the case of the transfer of a share by a part-owner, the possession of the other joint owners may be considered to be the possession of the vendee after the sale(*u*); yet, if the part-owner has the actual possession himself, delivery is not impossible, and ought to be made(*x*).

(*r*) *Hubbard* v. *Johnstone*, 3 Taunt. 177.

(*s*) Abb. Shipp. p. 12; *Monkhouse* v. *Hay*, 2 B. & B. 114; *Hay* v. *Fairbairn*, 2 B. & A. 193. See the Bankruptcy Act, 6 Geo. IV. c. 16, s. 72.

(*t*) *Robinson* v. *M'Donnell*, (re *The Glory*,) 2 B. & A. 134.

(*u*) *Addis* v. *Baker*, 1 Anstr. 222; *Gillespie* v. *Coutts*, Ambl. 652.

(*x*) Abb. Shipp. p. 13.

Secondly, where the ship is abroad at sea at the time of the transfer, the property will pass completely at common law by the indorsement of the grand bill of sale, and the delivery of the documents relating to the ship (*y*). But in such case the buyer ought to take possession immediately on the return of the vessel (*z*).

Sale by master.

The master has no authority to sell the ship, unless in cases of extreme necessity (*a*); and a sale by him will generally be set aside as fraudulent and collusive. So, if he is a part-owner the sale by him will not be good for more than his own part (*b*).

Of Transfer by Mortgage.

Mortgage of share in ship.

Respecting transfer of the ship, or a part, by way of mortgage, the registry act enacts that the officers of customs of the port of registry shall state, in the entry and in the indorsement on the certificate, that such transfer was made only by way of mortgage (*c*).

Mortgagee not owner.

A question had arisen under the former statutes, whether a mortgagee should be deemed the owner,

(*y*) *Ibid;* Ex parte *Matthews*, 2 Vez. 272; *Atkinson* v. *Maling*, 2 T. R. 462. See *Mestaer* v. *Gillespie*, 11 Ves. Jun. 637.

(*z*) *Mair* v. *Glennie*, 4 M. & S. 240.

(*a*) *Tremenheere* v. *Tresilian*, 1 Sid. 453; *Johnson* v. *Shippen*, 2 Ld. Raym. 984; *Hayman* v. *Molton*, 5 Esp. 65.

(*b*) Abb. Shipp. p. 3.

(*c*) 3 & 4 Will. IV. c. 55, s. 42; 6 Geo. IV. c. 110, s. 45. See 4 Geo. IV. c. 41, s. 43.

and be liable as such(*d*); since those statutes vested the legal interest in him without qualification. But it is now expressly declared that the mortgagee or trustee shall not be deemed to be the owner, except so far as may be necessary for the purpose of rendering the property available, by sale or otherwise, for the payment of the debt, for the securing whereof such transfer shall have been made(*e*). And the right or interest of the mortgagee, or other assignee, shall not be affected by the bankruptcy of the mortgagor after registry of the mortgage, although the mortgagor at the time of the bankruptcy had the property in his possession and disposition, and was the reputed owner (*f*).

PART III.

OF SALES OF PROHIBITED GOODS AND CHATTELS.

Contracts contrary to statutes void.

It is now the established rule, that courts of justice can give no assistance to the enforcement of contracts, which the legislature has interdicted. "Every contract, made for or about any matter or thing which is prohibited and made unlawful by any

(*d*) *Chinnery* v. *Blackburne*, 1 H. Bl. 117 n; *Jackson* v. *Vernon*, 1 H. Bl. 114; *Annett* v. *Carstairs*, 3 Campb. 354; Abb. Shipp. p. 53.

(*e*) 3 & 4 Will. IV. c. 55, s. 42; 6 Geo. IV. c. 110, s. 45; *Irving* v. *Richardson*, 2 B. & Adol. 193; *Kerswell* v. *Bishop*, 2 Cr. & J. 529; S. C. 2 Tyrw. 602.

(*f*) 3 & 4 Will. IV. c. 55, s. 43; 6 Geo. IV. c. 110, s. 46.

statute, is a void contract, though the statute itself doth not mention that it shall be so, but only inflicts a penalty on the offender; because a penalty implies a prohibition, though there be no prohibitory words in the statute"(*a*). The contrary doctrine was formerly held; for, where in a plea of sale in an open fair, the case of the fair day falling on a Sunday was not excepted in alleging the right to hold the fair, the Court declared the want of such exception to be immaterial, because they said that, although by the statute (*b*) there is a penalty inflicted upon the party that sells upon Sunday, yet it makes it not to be void(*c*). The doctrine is altogether overruled. Thus, it was determined that the seller could not recover the value of bricks sold under the statutable size (*d*). On the same principle, where in the sale of coals the form of the vendor's ticket given by statute(*e*) was not complied with, the plaintiff was nonsuited(*f*).

(*a*) *Per Holt*, C. J., *Bartlett* v. *Vinor*, Carth. 252. And see 1 Taunt. 136; *Gallini* v. *Laborie*, 5 T. R. 242; *Bensley* v. *Bignold*, 5 B. & A. 335; *Marchant* v. *Evans*, 2 B. Moore, 14; *Billard* v. *Hayden*, 2 C. & P. 472; *Houstoun* v. *Mills*, 1 M. & Rob. 325.

(*b*) 27 H. VI. c. 5.

(*c*) *Comyns* v. *Boyer*, Cro. Eliz. 485, referred to, 1 Taunt. 136, by *Mansfield*, C. J. See Bro. Abr. *Trespass*, pl. 328.

(*d*) *Law* v. *Hodson*, 11 East, 300; S. C. 2 Campb. 147. [Bricks for sale are required to be of certain dimensions by 17 Geo. III. c. 42.]

(*e*) 47 Geo. III. c. 68, s. 113.

(*f*) *Little* v. *Poole*, 9 B. & C. 192.

So, where butter was sold in firkins which were not branded and marked as required by statute (*g*). The selling of corn by any other measure than the Winchester bushel being prohibited (*h*), such a contract could not be enforced unless the ratio of the measure used to the standard measure was specified by the parties (*i*). If a contract, at the time of making it, was illegal by statute, a subsequent repeal of the statute will not make the contract valid (*k*).

Mere want of qualification of vendor does not avoid the sale.

Where, however, there is no prohibition against the selling of the goods, but merely a statutory enactment requiring the seller to be licensed, the value of the goods sold may be recovered, though the vendor were unqualified. This was held in a case where the plaintiff had sold tobacco without being duly licensed; the Court observing, that there was no fraud upon the revenue, which was the principle on which most of the smuggling cases were decided, and no clause in the Act making the contract of sale illegal, but at most it was a breach of a mere revenue regulation, protected by a

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(*g*) *Forster* v. *Taylor*, 5 B. & Ad. 887; 36 Geo. III. c. 86.

(*h*) 22 Car. II. c. 8, s. 2; 22 & 23 Car. II. c. 12, s. 2; 5 Geo. IV. c. 74; *Rex* v. *Major*, 4 T. R. 750; *Rex* v. *Arnold*, 5 T. R. 353.

(*i*) See *per* Ld. *Tenterden*, C. J., in *Watts* v. *Friend*, 10 B. & C. 448; *Tyson* v. *Thomas*, 1 M'Cl. & Y. 119; *Hockin* v. *Cooke*, 4 T. R. 314.

(*k*) *Jaques* v. *Withy*, 1 H. Bl. 65.

specific penalty (*l*). So, it was held by Lord Ellenborough, C. J., to be no defence that the goods were exported without paying the imposed duties, unless the evasion of the duties be proved to form part of the agreement (*m*). Where both the consideration and the matter to be performed are legal, the plaintiff is not precluded from recovering by an infringement of the law not contemplated by the contract in the performance of something to be done on his part (*n*).

Where vendee buys the goods for illegal purposes, and vendor is implicated, the sale is void.

Where the goods sold are intended to be applied by the vendee to some prohibited purpose, as for the purpose of being smuggled, although the selling of the goods is in itself a perfectly legal transaction, if the vendor implicates himself in the vendee's illegality, so as to become *particeps criminis*, he cannot recover their value. Thus, where one of the plaintiffs (who were partners) sold brandy in Guernsey, and sent it in half-ankers ready slung for the purpose of being smuggled into England, the court refused to set aside the nonsuit (*o*). So,

(*l*) *Johnson* v. *Hudson*, 11 East, 180; S. P. *Brown* v. *Duncan*, 10 B. & C. 93; S. C. 5 Man. & Ry. 114; see 5 B. & Ad. 896. See *Wetherell* v. *Jones*, 3 B. & Adolph. 221, where the delivery of an irregular permit by the plaintiff (a distiller) to the buyer was held not to vitiate the sale; and see *Dyster, ex parte*, 2 Rose's Bankruptcy Cases, 349; *Kemble* v. *Atkins*, 7 Taunt. 260. [*Meux* v. *Humphries*, 3 C. & P. 79; S. C. 1 M. & M. 132, is overruled by *Brooker* v. *Wood*, 5 B. & Ad. 1052.]

(*m*) *Catlin* v. *Bell*, 4 Campb. 183. See *Touissant* v. *Darlam*, 3 B. Moore, 217.

(*n*) *Per Curiam*, 3 B. & Ad. 226.

(*o*) *Biggs* v. *Lawrence*, 3 T. R. 454; S. P. *Chugas* v. *Pena-*

where the vendor assisted the purchaser in shipping the goods as a cargo on board of a vessel intended for an illegal and clandestine traffic, contrary to the provisions of a statute (*p*), it was held that he could not recover (*q*). If the seller actually assists in the packing of goods to be smuggled, or does any other act in aid of the buyer's illegal transaction, it is enough to prevent him from recovering, though he may not have been concerned in the profit or risk of the adventure (*r*).

But mere knowledge on the part of vendor does not avoid the sale.

It is not, however, a sufficient defence to the action that the plaintiff was merely aware of the intention of the purchaser to smuggle the property; it must appear that some assistance was rendered on the part of the vendor. Where the contract and delivery of goods are complete abroad, and the seller does no act to assist the smuggling them into this country, such a contract is valid, and may be recovered on here (*s*). The same was held, where the vendor knew that the goods were to be employed in an illegal trade, but rendered no assistance beyond selling the goods, and obtaining

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luna, 4 T. R. 466; and see *Thomas* v. *Withers*, and *Hennell* v. *Perry*, cited by *Buller*, J., 5 T. R. 117; *Paxton* v. *Popham*, 9 East, 408. 7 Ves. Jun. 473.

(*p*) 7 Geo. I. c. 21.

(*q*) *Lightfoot* v. *Tenant*, 1 B. & P. 551. And see *Gross* v. *Lapage*, Holt, N. P. C. 105.

(*r*) *Waymell* v. *Reed*, 5 T. R. 599; *Bernard* v. *Reed*, 1 Esp. 91.

(*s*) *Holman* v. *Johnson*, 1 Cowp. 341. And see 5 T. R. 600, *per* Ld. *Kenyon*, C. J.

permits for their delivery to the purchaser's agent (*t*).

In one case, however, it was determined that mere knowledge of the illegal intention was sufficient to invalidate the contract. The plaintiff, a druggist, sold to the defendant drugs which he knew were to be used in the brewery of the latter, whereas the statute (*u*) prohibits the use of any ingredient in the making of beer, other than malt and hops. It was held that he could not recover (*x*). There may be something in the peculiar circumstances of the case, as the statute was passed for the protection of the public *health* and of the public revenue (*y*).

The following prohibitory statutes concerning sales of goods, in respect of which questions have been judicially decided, are chronologically placed.

Sale of woollen cloths, &c.

Sale of woollen Cloths, &c.—The stat. 1 & 2 Phil. & Mar. c. 7, s. 2, prohibits persons not living in

(*t*) *Hodgson* v. *Temple*, 5 Taunt. 181; *Pellecat* v. *Reynolds*, 2 Cr. Mees. & Roscoe, 311.

(*u*) 42 Geo. III. c. 38. [A statute, subsequent to the period of the above contract, makes the sale of certain drugs to a brewer illegal, 51 Geo. III. c. 87.]

(*x*) *Langton* v. *Hughes*, 1 M. & S. 593.

(*y*) See ibid. p. 595. It must be observed, however, that the judgment of the Court, and especially of *Le Blanc*, J., seemed to rest on the mere fact of the vendor's knowledge. The case of *Holman* v. *Johnson* does not appear to have been cited or alluded to at all.

any city, borough, town corporate, or market-town from selling, by retail, woollen and linen cloth, haberdashery, grocery, and mercery wares, within the said cities, &c., or their suburbs or liberties.

It was adjudged upon demurrer, that this statute does not extend to prevent the inhabitants of one market-town from selling the specified goods in another (*z*). The decision was confirmed in a subsequent case (*a*).

The treating of voters.

The treating Act.—The treating Act (*b*) prohibits, on pain of disqualification, candidates, after the teste of the writ and before their election, from giving or allowing directly or indirectly to any person having voice or vote in such election any money, meat, drink, entertainment, or provision, or any present, gift, or reward; or from making any promise, agreement, obligation, or engagement to allow such money, provisions, present, gift, &c. in order (*c*) to be elected, &c.

An innkeeper cannot recover against a candidate for provisions furnished in violation of the above statute (*d*); and it was held, that non-resident voters are within the prohibition (*e*). The statute

(*z*) *Davis* v. *Leving*, 2 Lev. 89.

(*a*) *Lee* v. *White*, 1 Dougl. 256.

(*b*) 7 & 8 Will. III. c. 4.

(*c*) The words "*in order*" refer to the last clause only; see 1 B. & P. 265, *per cur.*

(*d*) *Ribbans* v. *Cricket*, 1 B. & P. 264.

(*e*) S. C.; *Lofhouse* v. *Wharton*, 1 Campb. 550 *n.*

applies equally to successful and unsuccessful candidates(*f*); nor is it material whether the canvassing party be the candidate himself, or his authorized agent, or any other person acting in his behalf(*g*). But the statute does not extend to the case of an entire stranger who is not acting in behalf of the candidate(*h*). If the plaintiff cannot be proved to have known that the purpose, to which the goods were intended to be applied, was in presents to voters, he will not be barred from recovering (*i*).

Selling of Game.—The selling of game was formerly prohibited by several statutes(*k*); but they are all repealed by the late Game Act, which makes it lawful for certificated persons to sell game to licensed dealers(*l*). Selling game.

It was determined under the old statutes, that the sale of living pheasants was illegal, and passed no property to the purchaser(*m*)

The stock-jobbing Act.—By Sir John Bernard's Stock-jobbing.

(*f*) *Ward* v. *Nanney* (Clerk), 3 C. & P. 399.
(*g*) *Id.*
(*h*) *Hughes* v. *Marshall*, 5 C. & P. 150.
(*i*) *Richardson* v. *Webster*, 3 C. & P. 128, *coram Best*, C. J.
(*k*) 5 & 6 Ann. c. 14, s. 2; 28 Geo. II. c. 12; 58 Geo. III. c. 75.
(*l*) 1 & 2 Will. IV. c. 32, s. 17.
(*m*) *Helps* v. *Glenister*, 8 B. & C. 553.

Act(*n*), commonly called the Stock-jobbing Act, it is enacted, that "all contracts and agreements "whatsoever made and entered into for the buy- "ing, selling, assigning or transferring of any "public joint-stock or stocks or other public "securities whatsoever, or of any part, share or "interest therein, whereof the person or persons "contracting or agreeing, or on whose behalf the "contract or agreement shall be made to sell, "assign, and transfer the same, shall not, at the "time of making such contract or agreement, be "actually possessed of or entitled unto in his, "her, or their own right, or in his, her, or their "own name or names, or in the name or names "of a trustee or trustees to their use, shall "be null and void to all intents and purposes "whatsoever(*o*)." But it is provided, that this shall not prevent any person from "lending any "sum or sums of money on any public or joint- "stock or other public securities whatsoever, or "any part, share or interest therein; or to pre- "vent any defeazance, contract or agreement "being made and entered into, for the re-deliver- "ing, assigning or transferring of such public or "joint-stock or other public securities, or any part, "share or interest therein, upon the re-payment "of the sum or sums of money, which shall have

(*n*) 7 Geo. II. c. 8; (made perpetual by 10 Geo. II. c. 8.)
(*o*) 7 Geo. II. c. 8, s. 8; *Breton* v. *Cope*, Peake, 31.

" been lent and borrowed thereupon, with interest " for the same; so as no premium or other con- " sideration whatsoever be paid to or received by " the person or persons lending such money, for " or in consideration of such loan, more than legal " interest(*p*)."

The words " public or joint-stock" relate to the British public funds; and a trafficking in Colombian bonds is not within the statute(*q*). But it has been held that *omnium* is stock(*r*). The tickets of a public lottery are not securities within the act(*s*).

Where the plaintiff empowered the defendant to sell out £3000, 4 per cent. stock, for his own benefit, in consideration of which defendant undertook to transfer at the next opening the same amount of stock in the plaintiff's name; this was held not to be within the prohibition of the eighth section of the statute, but within the exception of the eleventh(*t*). It is neither usurious, nor contrary to the stock-jobbing act, to take the full

(*p*) 7 Geo. II. c. 8, s. 11.

(*q*) *Henderson* v. *Bise*, 3 Stark. N. P. C. 158, *coram Abbott*, C. J.

(*r*) *Brown* v. *Turner*, 2 Esp. 631; S. C. 7 T. R. 630; *Olivierson* v. *Coles*, 1 Stark. N. P. C. 496.

(*s*) *Mortimer* v. *Salkeld*, 4 Campb. 42. (But the sale of lottery tickets would now be illegal, see 4 & 5 Will. IV. c. 37. See *Decy* v. *Shee*, 2 T. R. 617.)

(*t*) *Saunders* v. *Kentish*, 8 T. R. 162. And see *Maddock* v. *Rumball*, 8 East, 304.

interest which the stock itself would have produced, though the interest exceed five per cent., unless the transaction be colourable, and a mere device to obtain an usurious rate of interest(*u*).

Sale of small quantities of spirituous liquors.

The tippling Act.—By the tippling Act(*x*) it is enacted, that "no person shall maintain any action "for any debt or demand for any spirituous liquors, "unless such debt has been *bonâ fide* contracted at "one time to the amount of 20*s.* or upwards; nor "shall any item in any account be allowed where "the liquors delivered at one time and mentioned "in such item shall not amount to 20*s.* at the "least, without fraud; and where no part of the "liquors sold or delivered shall have been returned "or agreed to be returned directly or indirectly."

It was held by Lord Kenyon, C. J., that the statute does not apply where the liquor was sold to an eating-house keeper for the purpose of being sold again by the latter to his customers(*y*). But this case seems to be overruled, and the statute is equally applicable whether the sale was to the consumer himself or not(*z*).

It is immaterial whether the spirits are sold alone or mixed with water(*a*). Where the charge

(*u*) *Tate* v. *Wellings*, 3 T. R. 531.
(*x*) 24 Geo. II. c. 40.
(*y*) *Jackson* v. *Attrill*, Peake, 180.
(*z*) *Burnyeat* v. *Hutchinson*, 5 B. & A. 241.
(*a*) *Scott* v. *Gilmore*, 3 Taunt. 226.

forms one item in a bill, the statute bars the recovery of that item, though the plaintiff may recover for the residue (*b*). If two kinds of spirits are sold at the same time, amounting together to more than 20*s*., the seller may recover, though each separately were below that value (*c*).

The defendant cannot urge this statute as an objection to the claims of the plaintiff, after a settlement of accounts had between them (*d*).

PART IV.

OF SALES ON PROHIBITED DAYS.

The Lord's day.

By the statute of Charles II., for the better observation of the Lord's day, it is enacted (*a*), "that "no tradesman, artificer, workman, labourer, or "other person whatsoever, shall do or exercise any "worldly labour, business or work, of their ordi- "nary callings, upon the Lord's day or any part "thereof (works of necessity and charity only

(*b*) *Gilpin* v. *Rendle*, Selw. N. P. 61.

(*c*) *Owen* v. *Porter*, 4 C. & P. 367, *coram Bosanquet*, J.

(*d*) *Dawson* v. *Remnant*, 6 Esp. 24; and see *Spencer* v. *Smith*, 3 Campb. 9; *Crookshank* v. *Rose*, 5 C. & P. 19; *post*. [On the same principle it was held in a late case, that the value of goods sold by an illegal measure might be set off in an action brought against the vendor, where such claim had been included in a settlement of accounts between the parties, *Owens* v. *Denton*, 1 Cr. M. & Rosc. 711; see *Knox* v. *Whalley*, 1 Esp. 159.]

(*a*) 29 Car. II. c. 7, s. 1.

"excepted)." And that "no person or persons "whatsoever shall publicly cry, show forth, or ex- "pose to sale, any wares, merchandizes, fruits, "herbs, goods or chattels whatsoever, upon the "Lord's day or any part thereof."

Sales on Sunday void.

Upon this statute it has been decided, that a horse-dealer cannot maintain an action on the sale and warranty of a horse, made on Sunday (*b*). And the plaintiff cannot recover, though it were at the express instance and request of the defendant, that the contract was entered into on that day (*c*). Bayley, B. once expressed a doubt (*d*), whether the statute was intended to apply to all bargains on Sunday, and whether it was not confined to manual labour, and other work visibly laborious, and the keeping of open shops. But the learned Judge on a subsequent occasion observed, that he was satisfied such a construction would be contrary to the spirit of the Act. (*e*).

If within seller's ordinary calling.

To make a sale void under this statute, it must be proved to be within the ordinary calling of the seller or his agent. Therefore, where the plaintiff was a horse-*auctioneer*, and sold a horse on Sunday by *private contract*, it was held that the statute

(*b*) *Fennell* v. *Ridler*, 5 B. & C. 406.
(*c*) *Smith* v. *Sparrow*, 4 Bingh. 84.
(*d*) 3 B. & C. 234.
(*e*) 5 B. & C. 407.

did not apply (*f*). The contract must be proved to have been completed on Sunday; therefore, where there was no written memorandum of the contract at the time, and the horse sold was not delivered till the following Tuesday, the contract was held not to be complete until the latter day, and therefore not avoided by the statute (*g*). It seems the vendee may maintain an action on the contract, if he was ignorant of the fact, that the vendor was exercising his ordinary calling in selling the chattel (*h*). Where the contract was commenced on Saturday, but completed on Sunday, and the defendant was proved to have subsequently promised to pay, the Court held, that it might be considered a ratification of the agreement of Saturday, and that the action might be sustained (*i*).

(*f*) *Drury* v. *Defontaine*, 1 Taunt. 131; see *Peate* v. *Dicken*, 1 Cr. M. & R. 426. It seems that at common law any act on a Sunday, not prohibited by statute, would be legal; see Cro. Jac. 279, 406; 1 Stra. 472; 1 Taunt. 136; and see *Rex* v. *Younger*, 5 T. R. 449; *Rex* v. *Whitnash*, 7 B. & C. 596; *Begbie* v. *Levi*, 1 Cr. & J. 180; *Sandiman* v. *Breach*, 7 B. & C. 96.

(*g*) *Bloxsome* v. *Williams*, 3 B. & C. 232; see *Williams* v. *Paul*, 6 Bingh. 655.

(*h*) *Bloxsome* v. *Williams*, 3 B. & C. 232.

(*i*) *Williams* v. *Paul*, 6 Bingh. 653. *Bayley*, J. ruled at the trial that the defendant, having kept the chattel, was liable on the *quantum meruit*, though not for the price agreed on by the bargain of Sunday.

PART V.

OF SALES FRAUDULENT AGAINST CREDITORS.

Fraudulent alienations.

The statute of fraudulent alienations (*a*), reciting that gifts, conveyances, &c., had been contrived to delay, hinder, or defraud creditors of their lawful demands, enacts that all feoffments, gifts, grants, alienations, bargains, and conveyances of lands, goods, and chattels, made for such fraudulent purposes, shall be utterly void and of none effect, as against those persons whose actions, suits, debts, &c., might be in any wise disturbed, hindered, delayed, or defrauded. A subsequent section provides, that the act shall not extend to conveyances made, upon good consideration, to parties having no notice of such covin, fraud, or collusion (*b*).

Fraud against creditors.

The object of the statute was to protect *creditors* (*c*), against the clandestine and fraudulent

(*a*) 13 Eliz. c. 5.

(*b*) sect. 6.

(*c*) A conveyance by bill of sale, though it may be void against third parties, will bind the party executing it, and his assigns. *Robinson* v. *Mc'Donnell*, 2 B. & A. 134; *Steel* v. *Brown*, 1 Taunt. 381; *Hawes* v. *Leader*, Cro. Jac. 270; S. C. Yelv. 196; *Baker* v. *Lloyd*, Bull. N. P. 258; *Cowell* v. *Lane*, ibid. To protect *purchasers* the statute 27 Eliz. c. 4 was passed, relating to real estates only; see *Doe* dem. *Otley* v. *Manning*, 9 East, 59; 2 Sugd. Vend. p. 160, (9th Ed.)

assignments of property by debtors; and the question as to whether a transfer by the debtor be valid or void, must always be decided by reference to the motives and intention of the party making the transfer (*d*). Fraud, in such cases, may be either an inference of law from the circumstances, or it may be a conclusion of fact for the jury (*e*). "Where the fraud can be collected from the instrument itself, or from the instrument coupled with extrinsic circumstances, without any finding by the jury as to the intention of the party transferring, it is a question of law arising upon the facts; but when it depends on the real intention of the parties, that intention is a question of fact for the jury (*f*)."

Continuance of possession by the vendor, after the sale, is always a suspicious circumstance; since, in general, a change of possession accompanies a change of property, and by deviating from this ordinary course of dealing, third parties are deceived, and induced to give credit to the apparent owner (*g*). It seems to have been formerly

Continuance of possession a badge of fraud.

(*d*) "The question in every case is whether the act done is a *bonâ fide* transaction, or whether it is a trick and contrivance to defeat creditors." *Per* Lord *Mansfield*, C. J. Cowp. 435.

(*e*) "Fraud is sometimes a question of law, sometimes a question of fact, and sometimes a mixed question of law and fact." *Per Buller*, J. 5 T. R. 426.

(*f*) 2 Stark. Ev. p. 358 (2nd Edit.)

(*g*) *Twyne's* case, 3 Rep. 80 a.; *Chamberlayne* v. *Twyne*, Moore, 638; Shep. Touchst. 66.

held, that where a debtor executed a bill of sale of his property to his creditor, and was still permitted to remain in possession, it was such a badge of fraud as, *ipso facto*, to avoid the sale absolutely (*h*).

But not conclusive.

This doctrine is now somewhat qualified (*i*), and although continuance of possession is a strong presumption of fraud, it may be rebutted by extrinsic evidence.

Thus, where J. S. sued out a writ of execution against the duke of M., and having bought the goods, under the execution, from the sheriff, sold them by bill of sale to the plaintiff, and the property was left on the premises, and used by the duke as before the sale, but the circumstance of the execution was notorious in the neighbourhood, —in an action brought against another judgment creditor for removing the goods, it was held to be properly left to the jury, whether the sale was *bonâ fide*, or otherwise: the plaintiff had a verdict (*k*). In this case a servant had been left by the plaintiff in joint possession of the goods, but the decision

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(*h*) *Edwards* v. *Harben*, 2 T. R. 587; *Bamford* v. *Baron*, 2 T. R. 594, n. *Buller*, J., said, that the judges had been unanimously of opinion that, unless possession *accompanies and follows* the deed, it is fraudulent and void. *Ib.* p. 595. And see 5 Taunt. 217.

(*i*) See 1 B. & B. 512; 4 B. & C. 654; 3 B. & Ad. 505; *Eastwood* v. *Brown*, 1 Ry. & Moo. 312, *cor. Abbott*, C. J.

(*k*) *Latimer* v. *Batson*, 4 B. & C. 652. And see *Jezeph* v. *Ingram*, 1 B. Moore, 189; S. C. 8 Taunt. 838, where *Gibbs*, C. J., put it upon the ground of the notoriety of the execution.

did not depend on that circumstance; for it has been held, that joint possession is not a whit better than no possession at all(*l*). To evidence a substantial change of possession, it must be exclusive; even where possession is actually changed, if the former owner is allowed to interfere, and act as with his own property, there is evidence of fraud(*m*).

Possession consistent with the conveyance.

Where the continued possession of the vendor is consistent with the terms of the conveyance, such possession will not in general be deemed fraudulent(*n*); as where, by a *bonâ fide* settlement upon marriage, goods are settled on the wife, and the husband retains possession in pursuance of the terms of such settlement(*o*). So, where one lends another money to buy goods, and takes a bill of sale of the goods to secure repayment, but suffers the vendor to remain in possession, there is no fraud to vitiate the transaction(*p*). So, where the party buys goods himself, and lends them to an-

(*l*) *Wordall* v. *Smith*, 1 Campb. 332, *cor.* Lord *Ellenborough*, C. J. See *Hunt* v. *Stephens*, 3 Taunt. 113.

(*m*) *Paget* v. *Perchard*, 1 Esp. 205, *cor.* Lord *Kenyon*, C. J.

(*n*) *Reed* v. *Wilmott*, 5 M. & Payne, 553; see *Dewey* v. *Bayntun*, 6 East, 257.

(*o*) *Lord Cadogan* v. *Kennett*, Cowp. 432; *Cross* v. *Glode*, 2 Esp. 574.

(*p*) *Meggott* v. *Mills*, 1 Ld. Raym. 286; *Martindale* v. *Booth*, 3 B. & Adol. 498; *Kidd* v. *Rawlinson*, 2 B. & P. 59; *Benton* v. *Thornhill*, 7 Taunt. 149; Bull. N. P. 258.

other(*q*); as where plaintiff purchased a public house, but did not reside in it (because having another he could not procure a licence), and put an insolvent into possession, it was held, that the plaintiff might maintain an action against the sheriff, for seizing in execution his chattels and liquor in the house under an execution against the insolvent(*r*).

On the same principle, where a party mortgaged land, and in the same deed sold a windmill which was on the land, it was held good, and that the windmill could not be taken in execution under a *fi. fa.* against the vendor, though he had been allowed to remain in possession; because the possession was accounted for(*s*). But if it had been a chattel capable of easy removal, it would have been otherwise, although the instrument transferring the goods contained a valid mortgage of leasehold buildings, in which the chattels are situated(*t*).

Conditional conveyance.

So, where the conveyance depends on a con-

(*q*) *Leonard* v. *Baker*, 1 M. & S. 251. Especially if rent be received, *Watkins* v. *Birch*, 4 Taunt. 823.

(*r*) *Dawson* v. *Wood*, 3 Taunt. 256, (*Mansfield*, C. J. *dissentiente*).

(*s*) *Steward* v. *Lombe*, 1 B. & B. 506; (the jury had found that the windmill was not a fixture.)

(*t*) *Reed* v. *Blades*, 5 Taunt. 212. A symbolical delivery will be sufficient where the nature of the goods does not admit of better, *Manton* v. *Moore*, 7 T. R. 67; (on the old Bankruptcy Act, 21 Jac. I. c. 19).—*Post.*

dition precedent, the vendor's continuing possession does not avoid it, because, by the terms of the conveyance, the vendee is not to have the possession until he has performed the condition, and it is sufficient if possession follow the deed, though it be not immediate (*u*).

Where the intention is not fraudulent.

It has been stated, that the motives and intention of the parties must always be taken into consideration (*x*); therefore, where the obvious intention of the party transferring is not fraudulent, continuance of possession by him will not vitiate the sale. An assignment of all his effects by defendant to trustees, for the benefit of his creditors, was held not to be fraudulent, though made pending a suit, and for the purpose of delaying the plaintiff of his execution: because the motive was honest; the defendant felt that he had not sufficient to satisfy all his debts, and wished to make an equal distribution (*y*). A debtor, as well as an executor, may

(*u*) 2 T. R. 596. See *Cadogan* (Lord) v. *Kennett*, Cowp. 432; *Haslington* v. *Gill*, 3 T. R. 620, n.; *Stone* v. *Grubham*, 2 Bulstr. 225; *Bucknal* v. *Roiston*, Prec. Chan. 287. [So, it was decided, on the Bankruptcy Act, that the property in the goods did not pass to the assignees, though the bankrupt remained in possession for several months after the sale; the vendee having resumed possession a few days before the bankruptcy, *Jones* v. *Dwyer*, 15 East, 21.]

(*x*) *Supra*, p. 93.

(*y*) *Pickstock* v. *Lyster*, 3 M. & S. 371. And see *Meux* v. *Howell*, 4 East, 1; *Bowen* v. *Bramidge*, 6 C. & P. 140; *Estwick* v. *Caillaud*, 5 T. R. 420.

give preference to a particular creditor(*z*), by assignment or otherwise; provided he does so in payment of just demands, and not as a mere cloak for securing the property to himself(*a*). It is always an important consideration, whether the transaction have been secret or open. If it is a fact well known, that the party retaining possession is not the real owner, such possession cannot mislead, and the mischief will not arise. The notoriety, therefore, of the transaction is always strongly insisted upon, to rebut the presumption of fraud(*b*); as, in the cases cited, where the circumstance of the execution was well known (*c*). So, where the sale was notorious and public, being made by the sheriff(*d*); or, by the landlord under a distress for rent(*e*); or, by public auction (*f*). On the same principle, a bill of sale is good against a creditor, with whose knowledge and assent it has

Notoriety of transaction.

(*z*) 2 Stark. Ev. p. 361; *Holbird* v. *Anderson*, 5 T. R. 235; *Tolputt* v. *Wells*, 1 M. & S. 395; *Estwick* v. *Caillaud*, 5 T. R. 424.

(*a*) *Goss* v. *Neale*, 5 B. Moore, 19, 21.

(*b*) Whether the sale was notorious and *bonâ fide*, or fraudulent, is frequently a question for the jury, *Armstrong* v. *Baldock*, Gow, 33; *Martin* v. *Podger*, 2 Bl. Rep. 702. A secret transfer was a strong badge of fraud at common law, see *Mace* v. *Cammell*, Lofft, 783.

(*c*) *Latimer* v. *Batson*, 4 B. & C. 652; *Jezeph* v. *Ingram*, 8 Taunt. 838; S. C. 1 B. Moore, 189. *Supra*, p. 100.

(*d*) *Kidd* v. *Rawlinson*, 2 B. & P. 59.

(*e* *Guthrie* v. *Wood*, 1 Stark. N. P. C. 367.

(*f*) *Woodham* v. *Baldock*, 3 B. Moore, 11; S. C. Gow, 35, n.

been given, though possession may not have gone under it (*g*).

It is said in Buller's Nisi Prius (*h*), that no conveyance is fraudulent within the statute, unless it can be proved that the person was indebted at the time, or very near; though there have been determinations to the contrary (*i*). And it seems, that if a conveyance could be proved to have been made with a view to defraud a future creditor, it would be void under the statute (*k*). Fraud against future creditor.

PART VI.

OF SALES AFFECTED BY THE STATUTE OF BANKRUPTCY.

The effect of bankruptcy, upon sales of chattels, may be considered under the following heads:— Effect of bankruptcy on sales.

First, Where the bankrupt is in the situation of vendor. If the transfer took place before his bankruptcy, the transaction will not in general be affected by such subsequent event, unless the vendor had his bankruptcy in contemplation at the time,

(*g*) *Steel* v. *Brown*, 1 Taunt. 381; see *Leonard* v. *Baker*, 1 M. & S. 251.

(*h*) Page 257 a, (7th ed.) Cases there cited, *Walter* v. *Burrows*, Chan. 1745; *Taylor* v. *Jones*, 2 Atk. 600. And see *Lush* v. *Wilkinson*, 5 Ves. Jun. 384; *per* Lord *Tenterden*, C. J., 3 B. & Ad. 369.

(*i*) By Sir J. *Jekyll* and *Fortescue*, M. R., Bull. N. P. 257 a.

(*k*) 2 Stark. Ev. p. 361; see Evans's Statutes, Vol. I. p. 365, notes (3rd ed.).

and intended to give the vendee (being a creditor) a fraudulent preference. If the transfer took place after an act of bankruptcy, though in strictness the bankrupt has no longer any power of disposition over his goods, the statute provides that *bonâ fide* transactions shall be protected (unless a commission shall be sued out within *two months*), in order that the fair dealer may not be prejudiced by secret acts, of which he can have no notice.

Secondly, Where the bankrupt is in the situation of vendee, the statute extends a similar protection to *bonâ fide* dealings; and the payment of money, or delivery of goods, which belong to the bankrupt, would be good *at any time* before the issuing of the commission.

Thirdly, Where the bankrupt is in the situation either of vendor or vendee, an important class of cases relates to that enactment of the statute, which provides, that he shall be deemed to be the owner of property continuing in his possession, order, or disposition, at the time of his bankruptcy, and that such property shall pass to the assignees. This provision is, perhaps, not so much for the purpose of guarding against fraud, as for the purpose of preventing credit being given to false appearances, and of marking with certainty the ownership of goods, by making the property in general accompany the possession (*a*). The question, therefore,

(*a*) See 9 East, 238, 242.

usually is, not whether there has been fraud, but whether the bankrupt actually had, or had not, the control and disposition of the property, within the meaning of the statute.

SECTION I.—*Of Transfer of Goods by a Trader immediately* before *an act of Bankruptcy.*

Transfer before bankruptcy.

The Bankruptcy Act (*b*) enacts that, if any trader shall make a fraudulent grant or conveyance, or a fraudulent gift, delivery, or transfer of his goods or chattels, he shall be deemed to have committed an act of bankruptcy (*c*). Such transfer, therefore, though under colour of a sale, will be void, as being a fraud upon the bankrupt laws. In the former statutes of bankruptcy, "fraudulent grant or conveyance" only were mentioned, and it was accordingly held, that no transfer of property, though made fraudulently, and to give preference to a particular creditor, would amount to an act of bankruptcy, unless the transfer was *by deed* (*d*). The fraud, however, would have avoided the transaction (*e*); and now by the words of the new Act,

(*b*) 6 Geo. IV. c. 16, (which repeals all former statutes of bankruptcy).

(*c*) section 3.

(*d*) Cooke, B. L. p. 102.

(*e*) *Martin* v. *Pewtress*, 4 Burr. 2478.

such fraudulent alienation is itself an act of bankruptcy, whether by deed or otherwise (*f*).

Assignment of whole effects, void.

The assignment of the whole of his property by a trader is, in general, fraudulent and void (*g*), whether it be a voluntary preference or not (*h*); and a colourable exception of some inconsiderable portion does not alter the rule (*i*). But it has been recently determined that a *sale*, even of the whole effects of a trader, is not in itself an act of bankruptcy (*k*); and if the vendee acts *bonâ fide*, and gives an adequate valuable consideration for the goods, the transaction as regards him is valid, although the intention of the vendor were to abscond immediately (*l*).

Assignment of part, void in what cases.

The assignment even of part only of a trader's effects is void, when made in contemplation of bankruptcy, and in order to give a fraudulent pre-

(*f*) See Eden, B. L. p. 32; Evans's Statutes, p. 455, (3d ed.)

(*g*) *Butcher* v. *Easto*, 1 Dougl. 295; *Worsley* v. *Demattos*, 1 Burr. 467; see *Botcherby* v. *Lancaster*, 1 Ad. & Ell. 77; *Stewart* v. *Moody*, 1 Cr. M. & Rosc. 777.

(*h*) *Thornton* v. *Hargreaves*, 7 East, 544.

(*i*) *Wilson* v. *Day*, 2 Burr. 827, 832; *Compton* v. *Bedford*, 1 Bl. Rep. 362; *Law* v. *Skinner*, 2 Bl. Rep. 996.

(*k*) *Baxter* v. *Pritchard*, 1 Ad. & Ell. 456; S. C. 3 Nev. & M. 688. It is remarkable, that none of the old cases turn on a sale accompanied with payment of the full price. See 1 Ad. & Ell. 463.

(*l*) *Baxter* v. *Pritchard*, 1 Ad. & Ell. 456; *Rose* v. *Haycock*, 1 Ad. & Ell. 460, n.; S. C. 3 Nev. & Man. 644, n. See *per* Ld. *Kenyon*, C. J., *Whitwell* v. *Thompson*, 1 Esp. 72.

ference to a particular creditor (*m*), even where there has been a colourable sale (*n*). But if it be not made in contemplation of bankruptcy, the transfer will be good (*o*). When the transfer is not in itself an act of bankruptcy, it is the province of the jury to determine, whether the intention was fraudulent or not (*p*), and in contemplation of bankruptcy (*q*); and whether insolvency would be the probable consequence of the assignment (*r*). If his circumstances might reasonably lead the debtor to believe that his bankruptcy was probable, though not inevitable, the transfer will be void (*s*).

When not void.

When the transfer by a trader to a creditor is *not voluntarily* made, it will not be considered a fraudulent preference within the statute; as, where

(*m*) *Bevan* v. *Nunn*, 9 Bingh. 107; *Pulling* v. *Tucker*, 4 B. & A. 382; *Morgan* v. *Horseman*, 3 Taunt. 241; *Linton* v. *Bartlett*, 3 Wils. 47; *Harman* v. *Fisher*, Cowp. 117; *Alderson* v. *Temple*, 4 Burr. 2235; S. C. 1 Bl. Rep. 660; *Hassell* v. *Simpson*, 1 Dougl. 89, n.; *Singleton* v. *Butler*, 2 B. & P. 283; S. C. 3 Esp. 215.

(*n*) *Rust* v. *Cooper*, Cowp. 629.

(*o*) *Carr* v. *Burdiss*, 1 Cr. Mees. & Rosc. 443; *Morgan* v. *Brundrett*, 5 B. & Ad. 289; *Belcher* v. *Prittie*, 10 Bingh. 408; *Gibbins* v. *Phillips*, 7 B. & C. 529; *Wheelwright* v. *Jackson*, 5 Taunt. 109; *Fidgeon* v. *Sharp*, 1 Marsh. 196; *Yeats* v. *Groves*, 1 Ves. Jun. 280.

(*p*) *Balme* v. *Hutton*, 2 Y. & J. 101; *Flook* v. *Jones*, 4 Bingh. 20; S. C. 12 B. Moore, 96.

(*q*) *Gibbins* v. *Phillips*, 7 B. & C. 529.

(*r*) *Wedge* v. *Newlyn*, 4 B. & Ad. 831.

(*s*) *Poland* v. *Glyn*, 2 D. & R. 310; S. C. 12 B. Moore, 109, n.; 4 Bingh. 22 n.; *Cook* v. *Caldecott*, 1 M. & Malk. 522.

it is under apprehension of prosecution for forgery (*t*); or under apprehension of legal process (*u*), though such apprehension prove to be groundless (*x*); or, through ignorance of his own legal rights (*y*); or through the threats, or even the importunity, of the creditor (*z*), although the debt have not actually fallen due at the time (*a*). And a payment, made in pursuance of a prior special contract, cannot be considered as a fraudulent preference (*b*).

A bonâ fide sale, valid.

A genuine *sale* is good, though made immediately before bankruptcy (*c*). Where a valuable consideration has been given for the goods, though they may have been sold considerably below prime cost, the sale cannot be impeached, if the purchaser has acted *bonâ fide*, and if he could not reasonably have known that it was made with the view of defrauding creditors (*d*). However, purchasing goods from

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(*t*) *De Tastet* v. *Carroll*, 1 Stark. N. P. C. 88.

(*u*) *Corbould* v. *Broadhurst*, 1 M. & Rob. 189.

(*x*) *Thompson* v. *Freeman*, 1 T. R. 155.

(*y*) *Dixon* v. *Baldwin*, 5 East, 175.

(*z*) *Crosby* v. *Crouch*, 11 East, 256; *Smith* v. *Payne*, 6 T. R. 152; *Bayley* v. *Ballard*, 1 Campb. 416; *Davies* v. *Chippendale*, 2 B. & P. 282; *Reed* v. *Ayton*, Holt, N. P. C. 503. [Where evidence is given of a threat, it is still for the consideration of the jury whether the threat operated, *Cook* v. *Rogers*, 7 Bingh. 438.]

(*a*) *Hartshorn* v. *Slodden*, 2 B. & P. 582.

(*b*) *Hunt* v. *Mortimer*, 10 B. & C. 44. See Cowp. 125, *per* Ld. *Mansfield*, C. J.

(*c*) *Baxter* v. *Pritchard*, 1 Ad. & Ell. 456.

(*d*) *Cook* v. *Caldecott*, 4 C. & P. 315. And see *Hogg* v. *Mit-*

the bankrupt at unduly low prices, affords some evidence of unfair dealing (*e*).

A transfer by the trader (although at the time in an insolvent state), of goods, which in point of fact were the *bonâ fide* property of the transferree, is valid (*f*); thus, where a party, who has contracted for the purchase of goods, becomes embarrassed in his circumstances before their arrival, and, without any fraudulent intention, rescinds the contract of sale, and declines accepting the goods, it will be held that, notwithstanding his subsequent bankruptcy, his act was valid, and that the goods revested in the vendor (*g*). But if the contract had been perfected, and the vendee, on becoming subsequently insolvent, had attempted to rescind the contract, and return the goods, it would amount to a voluntary *preference*, and the transaction would

Transfer of goods, on rescinded contract.

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chell, 1 Stark. N. P. C. 241; *Robinson* v. *Carrington*, 1 Mont. & Ayr. 1.

(*e*) See *Yates* v. *Carnsew*, 3 C. & P. 102; 1 M. & Malk. 497, 522.—*Post*.

(*f*) If the goods do not belong to the trader at the time, *although he might by his own act make them his own*, it is not a fraudulent preference that he *declines to make them his own*, and transfers them to the real owner; but, if the property in the goods has already vested in the trader independently of his own volition, he cannot divest the property and retransfer the goods, without being guilty of a voluntary preference.

(*g*) *Salte* v. *Field*, 5 T. R. 211; *Atkin* v. *Barwick*, 1 Str. 165; *Lovat* v. *Parsons*, Cowp. 61. See *Graff* v. *Greffulhe*, 1 Campb. 89.

be void (*h*); as, where the vendor, by his own act, treats the goods as the property of the trader, which will be considered an election not to rescind the contract, although the trader himself may have been anxious to return the goods (*i*). And if the trader had the option, at the time of receiving the goods, of rescinding the contract, his right of exercising this option will be determined, if he keep the goods for a length of time; because the option ought to be exercised on the receipt of the goods, and not delayed until the trader is on the eve of bankruptcy (*k*).

Voluntary conveyance void.

Voluntary conveyances by the trader, whether of the whole or of part of his effects, are void as

(*h*) *Barnes* v. *Freeland*, 6 T. R. 80; *Harman* v. *Fisher*, Cowp. 117. All the cases cited in the preceding note were decided on the express ground, that there had been *no complete acceptance* of the goods by the vendee at the time of the rescission of the contract. (See the distinction, 5 T. R. 405; 6 T. R. 86; 2 East, 124.) Of the case of *Atkin* v. *Barwick*, Lord *Mansfield* said, that the judgment was right, but the reasons wrong; for the true ground of the decision was, that the trader very honestly *refused to accept* the goods, and accordingly returned them, Cowp. 125; 4 Burr. 2239.

(*i*) *Smith* v. *Field*, 5 T. R. 402.

(*k*) *Neate* v. *Ball*, 2 East, 117. It is not a material question in such case, whether the trader's conduct and intentions were right or wrong, but merely whether the act be contrary or not to the policy of the bankrupt-laws; and it is clearly not allowable for the trader to take the goods with the intention of keeping them if he continue solvent, and returning them if he fail. See *per* Lord *Kenyon*, C. J., *id.* 125.

against the assignees. It is enacted (*l*) that if any bankrupt, being at the time insolvent, shall (except upon the marriage of his children, or *for some valuable consideration,*) convey, assign, or transfer his goods and chattels, &c., the commissioners shall have power to sell and dispose of the same; though the sale is declared to be valid against the bankrupt, and all persons claiming under him.

SECTION II.—*Of Transfer of Goods* by *a Trader* after *he has committed an act of Bankruptcy.*

Transfer after bankruptcy.

After an act of bankruptcy, the trader has strictly no power whatever of disposing of his goods(*a*); for the property in a bankrupt's goods and chattels passes to the assignees, by relation, from the moment of the bankruptcy (*b*). Accordingly, it has been held that a sale or gift of the property by the bankrupt, after a commission has been awarded, though the commissioners have not become possessed of the goods, is void (*c*). So is a sale of goods generally,

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(*l*) 6 Geo. IV. c. 16, s. 73. See 1 Mont. & Gregg, B. L. p. 449, (3rd Ed.)

(*a*) *Waller* v. *Drakeford*, 1 Stark. N. P. C. 482; *Allanson* v. *Atkinson*, 1 M. & S. 583; *Copland* v. *Stein*, 8 T. R. 199.

(*b*) *Cooper* v. *Chitty*, 1 Burr. 20; *Lazarus* v. *Waithman*, 5 B. Moore, 313; *Copland* v. *Stein*, 8 T. R. 208.

(*c*) *Smith* v. *Mills*, Moor. 594.

after an act of bankruptcy has been committed, even before the commission is sued out (*d*).

When good. But, for the security of purchasers, it is enacted, that conveyances and other contracts, and dealings, by the bankrupt, made more than two calendar months (*e*) before the date and issuing of the commission (*f*); and payments really and *bonâ fide* made by the bankrupt to any creditor, at any time before the suing out of the commission (*g*), shall be valid, provided the party had no notice of any prior act of bankruptcy committed. And even where the party has notice, a *bonâ fide* purchase, for valuable consideration, shall not be impeached, unless the commission shall have been sued out within twelve calendar months after the act of bankruptcy (*h*).

Under the statute it was held, where a bankrupt's property was sold more than two months before the issuing of the commission, and part was purchased by a creditor, that, in an action brought by

(*d*) *Dyson* v. *Glover*, 3 Salk. 60. [It has been said, that a sale of goods by a bankrupt, even in market overt, did not alter the property against the assignees; *Per Twysden*, J. 1 Sid. 272. *Qu?* unless the vendee acted collusively.]

(*e*) If the time is saved by a single hour, it is sufficient; *Godson* v. *Sanctuary*, 1 Nev. & M. 52; *Cowie* v. *Harris*, 1 M. & Malk. 141.

(*f*) 6 Geo. IV. c. 16, s. 81.

(*g*) *Id.* sect. 82.

(*h*) *Id.* sect. 86. [This enactment is new; the old statutes contained sections similar to the 81st and 82nd.]

the assignees for the price, the sale must be deemed to have been made by the bankrupt, and not by the assignees, and that the defendant was therefore entitled to set off the debt due to him from the bankrupt (*i*). Where the bankrupt, after a secret act of bankruptcy, sells goods for a valuable consideration, it is protected by the statute (*k*); provided, however, that it be all one transaction, and provided that the parties really had a sale in contemplation (*l*). So, *bonâ fide* payments, after a secret act of bankruptcy, for actual debts, without any fraudulent preference, are protected by the statute (*m*), provided they be according to the ordinary and established course of dealing (*n*). It was held by *Tindal*, C. J., that giving a quantity of books, in payment of a dishonoured acceptance, was not a payment within the statute (*o*).

(*i*) *Southwood* v. *Taylor*, 1 B. & A. 471. See *Hankey* v. *Smith*, 3 T. R. 507, n.; *Atkinson* v. *Elliott*, 7 T. R. 378.

(*k*) *Hill* v. *Farnell*, 9 B. & C. 45; *Cash* v. *Young*, 2 B. & C. 413.

(*l*) *Carter* v. *Breton*, 6 Bingh. 617. See Lloyd & Welsby, Merc. Ca. 290.

(*m*) *Tucker* v. *Barrow*, 1 M. & Malk. 141; S. C. 3 C. & P. 85; *Shaw* v. *Battley*, 4 B. & Ad. 801; *Churchill* v. *Crease*, 5 Bingh. 177; *Teale* v. *Yonge*, 1 M'Clel. & Y. 497; *Cox* v. *Morgan*, 2 B. & P. 398.

(*n*) *Bolton* v. *Jager*, 1 Ry. & M. 265; *Hovil* v. *Browning*, 7 East, 154; *Harwood* v. *Lomas*, 11 East, 127; *Bishop* v. *Crawshay*, 3 B. & C. 415. It seems to be immaterial that the party receiving the money knew that the trader was in difficulties at the time; see 3 C. & P. 88.

(*o*) *Smith* v. *Moon*, 1 M. & Malk. 458.

When not protected, the sale is voidable only.

Even where the transfer by the bankrupt is not protected by the statute, it is only voidable at the election of the assignees, and no objection can be taken by third parties (*p*). Therefore, any act done by the assignees, affirming the transaction, makes it valid (*q*); as bringing assumpsit or debt, instead of trover, against the vendee (*r*). Nor can they repudiate the contract, after they have once affirmed it (*s*). If the assignees bring assumpsit, or other action in form *ex contractu*, the vendee may set off a debt due to him from the bankrupt (*t*). But a mere demand of payment, made by the assignees, does not conclude them from recovering in trover (*u*).

SECTION III.—*Of delivery of Goods or Money* to *a Trader* after *he has committed an act of Bankruptcy.*

Delivery of goods to bankrupt.

It is provided by the statute, that where the

(*p*) *Laroche* v. *Wakeman*, Peake, 140; *Webb* v. *Fox*, 7 T. R. 391; *Fowler* v. *Down*, 1 B. & P. 44; *Ashley* v. *Kell*, 2 Str. 1207.

(*q*) *Wilson* v. *Poulter*, 2 Str. 859; *Read* v. *Vaughan*, 7 Mod. 461; *Butler* v. *Carver*, 2 Stark. N. P. C. 433; *Reed* v. *James*, 1 Stark. N. P. C. 134; *Bradbury* v. *Anderton*, 1 Cr. Mees. & Rosc. 493, 494, (*per Parke*, B.).

(*r*) *Hussey* v. *Fidell*, 3 Salk. 59; S. C. 12 Mod. 324; *Burra* v. *Clarke*, 4 Campb. 355; *Evans* v. *Mann*, Cowp. 569.

(*s*) *Brewer* v. *Sparrow*, 7 B. & C. 310; *Vernon* v. *Hanson*, 2 T. R. 287.

(*t*) *Smith* v. *Hodson*, 4 T. R. 211.

(*u*) *Hurst* v. *Gwennap*, 2 Stark. N. P. C. 306. [And the Court afterwards refused a rule.]

party has no notice of a prior act of bankruptcy committed, all contracts and other dealings and transactions with the bankrupt, *bonâ fide* made and entered into, more than two calendar months (*a*) before the date and issuing of the commission, shall be valid (*b*); and also all payments *bonâ fide* made to the bankrupt (*c*), and delivery to the bankrupt of any goods, &c., which belong to him (*d*), at any time before the date and issuing of the commission, shall be valid.

What dealings protected.

Payment of bills in order to support the credit of a trader in embarrassed circumstances, without notice of his bankruptcy, is not fraudulent (*e*). An auctioneer is protected in paying over the proceeds of the sale to his principal (who is in prison), without notice of an act of bankruptcy committed by the latter (*f*). So, a factor is protected in paying, after notice of his principal's bankruptcy, a bill drawn by the latter and accepted by the factor

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(*a*) *Vid. supra*, p. 114, note (*e*).

(*b*) 6 Geo. IV. c. 16, s. 81.

(*c*) *Id.* section 82.

(*d*) *Id.* section 84.

(*e*) *Foxcroft* v. *Devonshire*, 2 Burr. 931; S. C. 1 Bl. Rep. 193. See remarks on this case in *Copland* v. *Stein*, 8 T. R. 204, 206.

(*f*) *Coles* v. *Robins*, 3 Campb. 183; *Coles* v. *Wright*, 4 Taunt. 198. In the latter case the party who actually paid the money was in fact cognizant of the act of bankruptcy, but as he was not the auctioneer himself but a mere bearer or messenger, he was held not liable.

before notice (*g*). So, *bonâ fide* payments by purchasers to bankrupt-vendors, without notice, are protected, whether the sale took place before or after the act of bankruptcy (*h*). It has been held, that a bill of exchange given in payment to the bankrupt, although the bill did not become payable till after the bankruptcy, was a payment protected by the statute (*i*). And returning to the bankrupt-vendor a bill, which had been accepted by him, but which when due had been dishonoured, is a good payment within the statute (*k*). But the payments must be according to the ordinary course of trade and dealing (*l*); and it has been held that payment of an anticipated debt is not protected (*m*).

Not voluntary payments with notice.

Voluntary payments made to, or on behalf of, the bankrupt, *after* notice of an act of bankruptcy committed, are not protected (*n*). But where the

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(*g*) *Wilkins* v. *Casey*, 7 T. R. 711.

(*h*) *Cash* v. *Young*, 2 B. & C. 413; *Hill* v. *Farnell*, 9 B. & C. 45; which seem to overrule *Sanderson* v. *Gregg*, 3 Stark. N. P. C. 72. See 9 B. & C. 51.

(*i*) *Bennet* v. *Spackman*, 1 C. & P. 274.

(*k*) *Mayer* v. *Nias*, 1 Bingh. 311; although the goods were agreed to be sold on *ready money* terms.

(*l*) *Ward* v. *Clarke*, 1 M. & Malk. 497. And see above p. 115.

(*m*) *Bishop* v. *Crawshay*, 3 B. & C. 415.

(*n*) *Vernon* v. *Hankey*, 2 T. R. 113; *King* v. *Leith*, 2 T. R. 141. In the latter case, the act of bankruptcy was only *inchoate*. [The issuing of the commission is not in itself notice in law of an act of bankruptcy; *Sowerby* v. *Brooks*, 4 A. & B. 523.]

payment is enforced by coercion of law, as where the trader has recovered judgment in a suit at law, before any commission has been sued out (*o*); or even after a commission has issued, and while it remains in force, but has not been proceeded upon (*p*); such payment is protected. However, if there be collusion between the bankrupt and the party making the payment, or, it seems, even if any steps have been taken by the party to facilitate the recovery, as by accepting short notice of trial (*q*), the assignees of the bankrupt may compel repayment. And the debtor ought to wait until the judgment has been actually obtained; therefore, where a creditor of the bankrupt sued the latter in the Mayor's Court, and an attachment issued against funds, in the hands of a third party, belonging to the bankrupt, it was held that the garnishee was not justified in paying the money under the attachment (*r*).

(*o*) *Foster* v. *Allanson*, 2 T. R. 479; *Prin* v. *Beal*, 3 Keble, 231; *Andrews* v. *Spicer*, id. 616.

(*p*) *Fuller* v. *Gibson*, 2 Cox, 24. And as the debtor is safe in paying the money under a verdict at law obtained *bonâ fide*, it is no defence at law to a suit for the recovery of a debt due, that the plaintiff has committed an act of bankruptcy, of which the defendant has notice, (2 T. R. 479); nor will a Court of Equity interfere, (2 Cox, Rep. 24).

(*q*) 2 Cox, Rep. 26, *per Ashurst*, J.

(*r*) *Windham* v. *Paterson*, 1 Stark. N. P. C. 147.

SECTION IV.—*Of Goods continuing in the Possession of a Trader (whether Vendor or Vendee) at the Time of his Bankruptcy.*

It has been already stated, that the continuance of possession by the vendor, after a transfer of the property by a bill of sale, is a strong badge of fraud, and tends to show that the sale was collusive, and void against creditors within the statute of Elizabeth (*a*). By the Bankruptcy Act it is enacted, that if any bankrupt, at the time he becomes bankrupt, shall, by the consent and permission of the true owner, have, in his possession, order, or disposition, any goods or chattels, whereof he was the reputed owner, or whereof he had taken upon himself the sale, alteration, or disposition, as owner, the commissioners shall have power to sell and dispose of the same (*b*).

Property in possession of bankrupt at the time of bankruptcy.

Passes to the assignees.

Under the statute, the goods must have been in possession of the bankrupt *at the time* (*c*) of his

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(*a*) 13 Eliz. c. 5; *supra*, p. 99. See the cases there cited upon the statute of Elizabeth. The principle upon which those cases are decided is founded upon the analogy of this provision of the Bankrupt Act.

(*b*) 6 Geo. IV. c. 16, s. 72. A similar enactment was contained in the repealed statute, 21 Jac. I. c. 19, s. 11.

(*c*) Therefore goods, coming into the bankrupt's possession *after* his bankruptcy, do not pass under the statute; *Lyon* v. *Weldon*, 2 Bingh. 334.

bankruptcy; therefore, if the owner take possession at any time before that event actually happens, it will be sufficient to protect his property (*d*); though it be but a single day (*e*).

Must have been with consent of owner.

The goods must have been in the bankrupt's possession, *with the consent and permission* of the true owner (*f*); therefore, where the vendee of a chattel sent it to the vendor, in order that some alteration might be made, which not being done, he became dissatisfied, and demanded it back again, on the bankruptcy of the vendor before redelivery to the vendee, the property was held not to pass to the assignees (*g*). So, where the vendor gave notice to the carrier to stop the goods *in transitu*, but they were delivered by mistake to the bankrupt-consignee, the sale was held to be rescinded by the notice, and the property to have revested in the vendor (*h*). So, where the true owner demanded the goods on the day before the bankruptcy, but the insolvent refused to deliver

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(*d*) *Jones* v. *Dwyer*, 15 East, 21.

(*e*) *Arbouin* v. *Williams*, 1 Ry. & M. 72. See *per Parke*, J., *Smith* v. *Topping*, 5 B. & Ad. 678; "the dividing point is the act of bankruptcy." These cases seem to overrule *Darby* v. *Smith*, 8 T. R. 82.]

(*f*) Ex parte *Richardson*, in re *Cheshire*, Buck, 480; *Viner* v. *Cadell*, 3 Esp. 88.

(*g*) *Carruthers* v. *Payne*, 5 Bingh. 270.

(*h*) *Litt* v. *Cowley*, 7 Taunt. 169; S. C. Holt, N. P. C. 328.—Post.

them, the case was held not to be within the statute (*i*).

What is deemed the possession of the bankrupt.

The possession of the trader's servant is equivalent to the possession of his master (*k*), and the possession of a third party will not be deemed adverse, if the trader be allowed to continue his trade as usual with the goods (*l*). Property in possession of a bankrupt-vendee will pass to the assignees, though the condition of the sale were, that, in the event of bankruptcy, the vendor might retake it (*m*). Property belonging to a dormant partner will pass to the assignees of the ostensible partner, in the event of the bankruptcy of the latter (*n*).

What divests the possession.

In order to satisfy the statute, some overt act must be done by the trader to divest the possession out of himself (*o*). Where the goods remained, after the sale, in the bonded warehouse of the vendor, till the time of his bankruptcy, though the

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(*i*) *Smith* v. *Topping*, 5 B. & Ad. 674.

(*k*) *Jackson* v. *Irvine*, 2 Campb. 48. [As to the admissibility of evidence of reputed ownership, and of a contrary reputation, see *Gurr* v. *Rutton*, Holt, N. P. C. 327; *Oliver* v. *Bartlett*, 1 B. & B. 269. And see 1 Bingh. N. S. 335.]

(*l*) *Toussaint* v. *Hartop*, Holt, N. P. C. 335; *Doker* v. *Hasler*, 2 Bingh. 479; *Longman* v. *Trip*, 2 N. R. 67.

(*m*) *Holroyd* v. *Gwynne*, 2 Taunt. 176.

(*n*) Ex parte *Enderby*, 2 B. & C. 389, (seems to overrule *Coldwell* v. *Gregory*, 1 Price, 119.) And see Ex parte *Dyster*, 2 Rose, B. Ca. 256.

(*o*) See *Shaw* v. *Hervey*, 1 Ad. & Ell. 920, 925; *Davis* v. *Dale*, Lloyd & Welsby, Merc. Ca. 291.

purchaser's initials were marked upon them, they were held to be in the bankrupt's possession, order, and disposition, within the statute (*p*). So it is, if the goods lie at a wharf, and the purchaser neglects to have his name transferred in the wharfinger's books (*q*); or, where the goods have been traded with in the name of the bankrupt vendor (*r*).

Symbolical delivery.

But if as good a delivery, as the nature of the case admits of, be made by the vendor to the purchaser, the property will not pass to the assignees; as, where a quantity of timber is taken possession of by the symbolical delivery of a halfpenny (*s*). So, the assignment of the bill of lading vests the property in a cargo of goods at sea (*t*); or, the delivery of the grand bill of sale, of a vessel at sea (*u*). So, the assignment of West India Dock warrants, (or of any transfer tickets (*x*),) was held to transfer the property in sugars, &c., lying at the docks (*y*); or, the lodging of a delivery-order with

(*p*) *Knowles* v. *Horsfall*, 5 B. & A. 134. See *Lingard* v. *Messiter*, 1 B. & C. 308.

(*q*) See *Jones* v *Dwyer*, 15 East, 21.

(*r*) *Gordon* v. *E. I. Company*, 7 T. R. 228.

(*s*) *Manton* v. *Moore*, 7 T. R. 67.

(*t*) *Brown* v. *Heathcote*, 1 Atk. 160. See *Lempriere* v. *Pasley*, 2 T. R. 485.—Post.

(*u*) *Atkinson* v. *Maling*, 2 T. R. 462.

(*x*) *Ridout* v. *Alder*, 1 Mont. 103. See *Wilkinson* v. *Reay*, Dan. & Lloyd, Merc. Ca. 202.

(*y*) *Lucas* v. *Dorrien*, 1 B. Moore, 29; *Greening* v. *Clarke*, 4 B. & C. 316; *Davenport*, ex parte, 1 Deac. & Chit. 397.

the wharfinger, although the goods were not actually transferred in the wharfinger's books (*z*).

Where the goods remain in the warehouses of the vendor, undistinguished from the rest of his stock, they will pass to the assignees on his bankruptcy (*a*). Otherwise, if the goods have been kept distinct, and the purchaser has, by some act, appropriated them to himself; as, where the purchaser of wine left it with the merchant for his own convenience, but had the bottles sealed with his own seal, and deposited in a particular bin (*b*).

Mere temporary custody, not within the statute.

And, in general, mere temporary custody of goods is not within the statute (*c*); as, where the purchaser of a carriage, being abroad, left it for a period agreed upon in the custody of the coachmaker, who afterwards became bankrupt (*d*); or, where a purchaser sends timber to a wharf for sale, directing his servant to sell them, and the owner of the wharf becomes bankrupt (*e*); or, where a father allows his son, as agent merely, to

(*z*) *Tucker* v. *Ruston*, 2 C. & P. 86; *Arbouin* v. *Williams*, Ry. & Moo. 72. See 2 Campb. 246.

(*a*) *Thacktwaite* v. *Cocks*, 3 Taunt. 487. See *White* v. *Wilks*, 5 Taunt. 176; *Batten*, ex parte, 3 Deac. & Chit. 328.

(*b*) Ex parte *Marrable*, 1 Glyn. & Jam. 402.

(*c*) Ex parte *Flyn*, in re *Matthews*, 1 Atk. 185; see *Muller* v. *Moss*, 1 M. & S. 335. [And see above, p. 111, and the cases there cited, as to the power of a vendee, being in embarrassed circumstances at the time of the receipt of the goods, to decline accepting them, and to re-transfer the property to the vendor.]

(*d*) *Bartram* v. *Payne*, 3 C. & P. 175.

(*e*) *Boddy* v. *Esdaile*, 1 C. & P. 62.

carry on trade with the goods(*f*). So, property, placed in the hands of a trader for some specific purpose, will not, in the event of his bankruptcy, pass to the assignees(*g*); thus, where an agent contracted in his own name, but in reality on behalf of his principal, to supply certain timber, the timber, being placed in his hands for the purposes of the contract, was held on his bankruptcy not to pass under the statute(*h*). Goods obtained under false pretences do not pass(*i*). But goods sent to a trader *on sale or return*, remaining in his possession at the time of his bankruptcy, though sent only for such special purpose, have been held to pass to the assignees(*k*); unless the trader, after receiving them, left them unpacked, and exercised no act of ownership(*l*). And, where chattels and fixtures are let on lease together to a trader, though the fixtures do not pass(*m*), the chattels

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(*f*) *Stafford* v. *Clarke*, 1 C. & P. 24.

(*g*) *Tooke* v. *Hollingworth*, 5 T. R. 215; *Moore* v. *Barthrop*, 1 B. & C. 5; S. C. 2 D. & R. 25.

(*h*) *Collins* v. *Forbes*, 3 T. R. 316. See *Davis* v. *Living*, Holt, N. P. C. 275.

(*i*) *Gladstone* v. *Hadwen*, 1 M. & S. 517, (which seems to overrule *Milward* v. *Forbes*, 4 Esp. 171.) See 2 Bingh. 517.

(*k*) *Livesay* v. *Hood*, 2 Campb. 83.

(*l*) *Gibson* v. *Bray*, 8 Taunt. 76; S. C. 1 B. Moore, 519. The trader became bankrupt on the evening of their arrival.

(*m*) *Clark* v. *Crownshaw*, 3 B. & Ad. 804; *Combs* v. *Beaumont*, 5 B. & Ad. 72; *Boydell* v. *M'Michael*, 1 Cr. Mees. & R. 177.

will be held to go to the assignees, under the statute (*n*).

Specific appropriation by trader.

Where the trader, before his bankruptcy, has specifically appropriated certain property in favour of a third party, it will not be considered to be within the possession, order, and disposition of the bankrupt, and will not therefore pass to the assignees under the statute:—as, where the trader gives a written order, for the sale of certain goods in the hands of a third party, in order to apply the proceeds to the payment of an outstanding bill, but becomes bankrupt before the sale takes place (*o*); or, where he requests the defendant (being his debtor) to pay to J. S. (being his creditor) the sum of money due from the defendant, which the latter promises to do, but the trader becomes bankrupt, after the amount had been ascertained, but before the payment has been made (*p*). So it is, where a party accepts bills of exchange drawn by the trader, on the faith of a special agreement, that the proceeds of a certain consignment shall be applied to the payment of the bills (*q*); or, where a party advances money upon an express

(*n*) *Horn* v. *Baker*, 9 East, 215; *Bryson* v. *Wylie*, 1 B. & P. 83, n.; *Sinclair* v. *Stephenson*, 2 Bingh. 514; *Lingham* v. *Biggs*, 1 B. & P. 82.

(*o*) *Baily* v. *Culverwell*, 8 B. & C. 448; *Favenc* v. *Hullett*, 1 Campb. 554. See *Graff* v. *Greffulhe*, 1 Camph. 89.

(*p*) *Crowfoot* v. *Gurney*, 9 Bingh. 372; *Bedford* v. *Perkins*, 3 C. & P. 90.

(*q*) *Thomas* v. *Da Costa*, 2 B. Moore, 386.

agreement that the trader shall remit to him certain proceeds by way of security(*r*). In order, however, to constitute a specific appropriation, there must have been some express and positive agreement, or some specific order given by the trader; a mere general agreement(*s*), or a bare direction(*t*) to the party holding the property, to apply it to a certain purpose, is insufficient. An agreement by the trader to assign, on a contingency, goods uncertain in quantity, and remaining unascertained until the bankruptcy happens, will not amount to a specific appropriation:—thus, where the trader, in pursuance of an agreement with J. S., who was under liabilities as indorser of several bills drawn by the trader, gave directions to his agent abroad to hand over, in favour of J. S., such property in the agent's hands as might be sufficient *to cover the amount of bills that eventually might not be paid*,—it was held, after the bankruptcy of the trader, that there had been no legal or equitable assignment of the property to J. S.; and the assignees accordingly recovered the value in trover(*u*).

(*r*) *Fisher* v. *Miller*, 1 Bingh. 150. And after the appropriation has once been made, even the trader himself before his bankruptcy has no power to rescind it: for it is different from a mere order to an agent to pay money, which is countermandable at any time before execution; See 1 Bingh. 155.

(*s*) *Carter* v. *Barclay*, 3 Stark. N. P. C. 43.

(*t*) *Williams* v. *Everett*, 14 East, 582.

(*u*) *Carvalho* v. *Burn*, 4 B. & Ad. 382; S. C. (affirmed in error) 1 Ad. & Ell. 883.

Property in *auter droit*, not within the statute.

Property in the possession of the bankrupt in *auter droit* does not pass to the assignees(*x*); such as, property which he possesses as trustee(*y*), or, as executor or administrator(*z*), or, as bailee, where the possession is notorious as such(*a*), or, as factor(*b*). And it was held that, where the property had been sold by the factor, who became bankrupt before the price was paid, the principal might sue the purchaser for the price(*c*); or, if the price has been paid to the assignees, he may recover it from them(*d*). But if the bankrupt has received the price, the principal has no other remedy than to prove the debt, as a general creditor, against the estate; unless bills have been received in payment, or other property specifically distinguishable from the property of the bankrupt(*e*).

(*x*) *Winch* v. *Keeley*, 1 T. R. 619.

(*y*) S. C.; *Carpenter* v. *Marnell*, 3 B. & P. 40. See *Copeland*, ex parte, 2 Mont. & Ayrt. 191, *per Erskine*, C. J.

(*z*) *Bennet* v. *Davis*, 2 P. Wms. 318.

(*a*) *Watson* v. *Peache*, 1 Bingh. N. S. 327.

(*b*) *Garret* v. *Culham*, Bull. N. P. 42. [So, where the bankrupt had authority to sell in the name of the consignor, and wrongfully sold the goods in his own name; *Carlow*, ex parte, 2 Mont. & Ayr. 39.]

(*c*) *Scrimshire* v. *Alderton*, 2 Str. 1182. See *per* Lord *Mansfield*, Cowp. 255.

(*d*) Ex parte *Murray*, Co. B. L. 384. See Willes, 404.

(*e*) *Scott* v. *Surman*, Willes, 400; *Whitecomb* v. *Jacob*, 1 Salk. 160; *Taylor* v. *Plumer*, 3 M. & S. 562.

CHAP. IV.

OF SALES VOID AT COMMON LAW.

SALES may be void at common law; I. On the ground of Fraud; II. On the ground of Immorality; III. As being against Public Policy.

SECTION I.—*Of Sales void by Fraud.*

1. *Fraud against the Vendee.*

If the vendor, or his agent(*a*), be guilty of fraud against the vendee, the contract of sale cannot in general be enforced. Fraud against vendee.

Thus, in sales by auction, the employment of *puffers*, in order to enhance the price of the goods, without giving notice to the bidders, is fraudulent(*b*). So, where a false description of the goods is given in the catalogue of sale(*c*), or otherwise(*d*): and a stipulation, that the sale shall not Puffing.

(*a*) *Hill* v. *Gray*, 1 Stark. N. P. C. 434.

(*b*) *Crowder* v. *Austin*, 3 Bingh. 368. See next Chapter.

(*c*) *Coverley* v. *Burrell*, 5 B. & A. 257.—Post.

(*d*) *Steward* v. *Coesvelt*, 1 C. & P. 23; *Flight* v. *Booth*, 1 Bingh. N. S. 370; *Loyes* v. *Rutherford*, Sugd. Vend. p. 309, (9th ed.); *Duke of Norfolk* v. *Worthy*, 1 Campb. 337; *Trower* v. *Newcome*, 3 Mer. 704.

be void through any mis-statement, will be held to apply only to inadvertent errors, and not to wilful misdescriptions(*e*). But the Court will give a reasonable construction to the agreement; and, to vacate the contract, the misdescription must be material(*f*). It seems that, if the vendee knew the description to be false, he cannot take advantage of the defect, either at law or in equity(*g*).

Goods sold *with all faults.*

Where goods are sold *with all faults*, the sale is nevertheless void, if the vendor knew of latent defects, and used secret means to conceal them, or if he fraudulently misrepresented the condition at the time of the sale(*h*). But the vendor is not liable, provided he used no artifice to conceal them(*i*). Lord Kenyon indeed held, that mere knowledge of the defects on the part of the vendor was sufficient to avoid the sale, and that the terms of taking the goods "with all faults" must be understood to relate only to those defects, which the purchaser could have discovered, or with which the vendor was unacquainted(*k*). But

(*e*) *Norfolk* v. *Worthy*, 1 Campb. 337; *Leach* v. *Mullett*, 3 C. & P. 115.

(*f*) *Belworth* v. *Hassell*, 4 Campb. 140; *Day* v. *Fynn*, Owen, 133; *Bowles* v. *Atkinson*, Sugd. Vend. p. 317.

(*g*) *Dyer* v. *Hargrave*, 10 Ves. Jun. 505; Sugd. Vend. p. 310. *Scientia utrinque par pares facit contrahentes.*

(*h*) *Schneider* v. *Heath*, 3 Campb. 506; *Fletcher* v. *Bowsher*, 2 Stark. N. P. C. 561.

(*i*) *Baglehole* v. *Walters*, 3 Campb. 154.

(*k*) *Mellish* v. *Motteux*, Peake, 115.

Lord Ellenborough was of opinion that, where an article was sold "with all faults," it was quite immaterial how many belonged to it within the knowledge of the seller, unless he used some artifice to disguise them, and to prevent their being discovered by the purchaser. "The very object of introducing such a stipulation is, to put the purchaser on his guard, and to throw upon him the burden of examining all faults both secret and apparent; it would be most inconvenient and unjust if men could not, by using the strongest terms which language affords, obviate disputes concerning the quality of the goods which they sell(*m*)." However, the stipulation, that the article is to be sold "with all faults," will be intended to mean all faults which it may have consistently with its being the thing described; therefore, if a silver service is contracted to be sold on these terms, and it turns out to be plated, the vendor would be liable(*n*).

By sample.

Where the goods are sold by sample, if the bulk of the commodity bargained for does not correspond with the sample, the vendee is at liberty to rescind the contract; and he has a right to inspect the bulk and compare them together, independently of any usage of trade(*o*). Even if there have

(*m*) *Baglehole* v. *Walters*, 3 Campb. 154. See Ball & Beatty, 515; Sugd. Vend. p. 313, (9th ed.).

(*n*) *Per curiam*, 5 B. & A. 241.—Post.

(*o*) *Lorymer* v. *Smith*, 1 B. & C. 1; S. C. 2 D. & R. 23.

been no actual fraud, but merely negligence or inadvertence, the vendee may set up, in bar of the action, the fact that the sample does not accord with the bulk; though it be proved, that the usual custom is to make an allowance for the inferior quality (*p*). But where the contract was, that such a quantity of the goods sold, as might be deemed unmerchantable, should be rejected, the defendant was held bound to accept so much as might be proved to be of merchantable quality (*q*).

By written contract.

Where the goods are sold by written contract, and not by sample, it is a good defence to the action that they do not correspond with the description; and it is not enough for the plaintiff to show that they correspond with a sample exhibited at the time of sale (*r*). So, on the other hand, the purchaser cannot give in evidence, in such case, that the goods do *not* correspond with the sample, if there be no reference to the sample in the sale-note (*s*).

With a warranty.

Where the goods are sold with a warranty, it is a good defence, that a deceitful representation has been made, and that the goods do not correspond with the warranty (*t*).

(*p*) *Hibbert* v. *Shee*, 1 Campb. 113.

(*q*) *Graham* v. *Jackson*, 14 East, 498.

(*r*) *Tye* v. *Fynmore*, 3 Campb. 462.

(*s*) *Meyer* v. *Everth*, 4 Campb. 22. [But the purchaser might have maintained an action for deceit, *ibid. per* Ld. *Ellenb.* C. J.]

(*t*) *Poulton* v. *Lattimore*, 9 B. & C. 259; *Lewis* v. *Cosgrave*, 2 Taunt. 2. See *Hupe* v. *Phelps*, 2 Stark. N. P. C. 480. *Rex* v. *Pywell*, 1 Stark. N. P. C. 402.—Post.

Vendee must object within reasonable time.

The vendee must object to the quality within a reasonable time, if he intends to set up, as a defence to the action, that the commodity does not accord with the sample exhibited, or with the representation made by the vendor; therefore, where the defendant acquiesced for a month, and put up the goods to be resold, he was compelled to complete the contract(*u*). So, where, after discovering the fraud, the vendee continues to deal with the property as his own, he cannot afterwards recover back the money(*x*); not even, it seems, if he subsequently discover some additional incident in the fraud(*y*). The giving a bill of exchange, or promissory note, does not preclude the vendee from giving evidence of actual fraud in the sale, in an action by the vendor on the security(*z*); though the defendant is estopped from objecting on any other ground to the reasonableness of the demand, as, that the goods were damaged in quality, or that the price was exorbitant(*a*).

(*u*) *Parker* v. *Palmer*, 4 B. & A. 387; *Milner* v. *Tucker*, 1 C. & P. 15; *Percival* v. *Blake*, 2 C. & P. 514. And see below, Book II. Part 2, Chap. iii.

(*x*) *Campbell* v. *Fleming*, 1 Ad. & Ell. 40; S. C. 3 Nev. & Man. 834.

(*y*) S. C.

(*z*) *Solomon* v. *Turner*, 1 Stark. N. P. C. 51; *Fleming* v. *Simpson*, 1 Campb. 40, n.; *Lewis* v. *Cosgrave*, 2 Taunt. 2.

(*a*) *Morgan* v. *Richardson*, 1 Campb. 40, n., (cited 7 East, 482); *Knox* v. *Whalley*, 1 Esp. 159; *Obbard* v. *Betham*, 1 M. & Malk. 483; *Tye* v. *Gwynne*, 2 Campb. 346.

Suppressio veri.

The *suppressio veri* will vitiate a contract of sale, as much as the *allegatio falsi*(*b*). If the seller fraudulently conceal what he ought to communicate, he is equally guilty of fraud as if he expressly asserted what was not true. There is no distinction in effect between an active and a passive communication(*c*). Thus, where in the purchase of a picture represented to be a Claude, the vendee was known to entertain the erroneous opinion, that the picture had been in the cabinet of an individual who had the reputation of a connoisseur, it was held by Lord Ellenborough, C. J., that the plaintiff could not recover, even if the painting were proved to be a genuine Claude(*d*).

Trickery and contrivance.

If the vendor endeavours by a trick to induce the purchaser to enter into a foolish contract, even where the sale is not absolutely avoided, the plaintiff will not be allowed to recover more than a reasonable value (*e*). Therefore, where the defendant had been induced to offer, in payment for a horse, a barleycorn for the first nail in the shoe, doubling the price in progression for every other nail, the judge directed the jury to give the value of the horse in damages(*f*). So, where the

(*b*) See 1 East, 318.

(*c*) See *Early* v. *Garrett*, 9 B. & C. 932, *per Bayley*, J.; *Carter* v. *Boehm*, 3 Burr. 1905; S. C. 1 Bl. Rep. 593.

(*d*) *Hill* v. *Gray*, 1 Stark. N. P. C. 434. And see *Stevens* v. *Adamson*, 2 Stark. N. P. C. 422; *Granger* v. *Worms*, 4 Campb. 83.

(*e*) See 1 Wils. 295, *per* Lord *Hardwicke*, C. J.

(*f*) *James* v. *Morgan*, 1 Lev. 111. See *Thornborow* v. *Whit-*

vendor takes advantage of the needy and embarrassed circumstances of an expectant heir, and sells to him, on credit, at extravagant prices, goods, which he knows will be immediately resold at a loss in order to raise money, the defendant will be relieved in equity (*g*). So, where the vendor takes advantage of the imbecility (*h*), or of the inebriety (*i*), of the purchaser, to induce him to enter into a disadvantageous bargain, the contract will not be enforced. It seems to have been formerly held, even in equity, that a party entering into a contract when in a state of intoxication, was not entitled to relief, unless some fraud or contrivance had been practised by the other party (*k*); but probably the contract would now be held void, if the defendant could show that he was so drunk at the time that he did not know what he was doing, although the drunkenness were entirely his own act (*l*).

Imbecility or inebriety of purchaser.

acre, 2 Ld. Raym. 1164; *Boldero* v. *Andrews*, (cited Bull. N. P. 156); see 1 Vent. 65, 267.

(*g*) *King* v. *Hamlet*, 4 Sim. 223. See *Bosanquet* v. *Dashwood*, Ca. temp. Talbot, 38.

(*h*) *Ante*, p. 42; *Levy* v. *Baker*, 1 M. & Malk. 106, n.

(*i*) *Fenton* v. *Holloway*, 1 Stark. N. P. C. 126; *Pitt* v. *Smith*, 3 Campb. 33; *Cole* v. *Robins*, Bull. N. P. 172; *Yates* v. *Boon*, ibid.; *Butler* v. *Mulvihill*, 1 Bligh, 137. See *Gregory* v. *Frazer*, 3 Campb. 454.

(*k*) *Johnson* v. *Medlicott*, 3 P. Wms. 130, n.; *Cooke* v. *Clayworth*, 18 Ves. Jun. 12.

(*l*) *Cole* v. *Robins*, referred to in Bull. N. P. 172; Fonbl. Eq. 67; Chit. Contracts, p. 113 (2d Ed.); *Cory* v. *Cory*, 1 Vez. 19.

2. *Fraud against the Vendor.*

Fraud against vendor.

If the purchaser be guilty of fraud, the vendor will not be compelled to complete the contract. Thus, where the plaintiff, at an auction, addressed the company present, and stated that he had been ill used by the owner, and had a claim upon him, whereby they were deterred from bidding, and the article was knocked down at one-fourth of the prime cost, it was held that the action could not be supported (*m*). However, a purchaser is not bound to disclose the highest price which he is willing to give for goods offered to sale, and it is not every false statement made by him that will be sufficient to avoid the sale, or to render him liable to an action of deceit (*n*).

Goods obtained on false pretences.

Where a party procures the goods to be delivered to him, under false pretences, the transfer does not change the property (*o*); as, where at the time

(*m*) *Fuller* v. *Abrahams*, 3 B. & B. 116. See *Levi* v. *Levi*, 6 C. & P. 239.

(*n*) *Vernon* v. *Keyes*, 4 Taunt. 488; (in the Exchequer Chamber, affirming judgment of K. B., 12 East, 632).

(*o*) *Noble* v. *Adams*, 7 Taunt. 59; *Anon.*, 6 Mod. 114. See *Gladstone* v. *Hadwen*, 1 M. & S. 517; *Taylor* v. *Plumer*, 3 M. & S. 562; *Rex* v. *Jackson*, 3 Campb. 370; *Rex* v. *Lara*, 6 T. R. 565. [It was held in one case that goods, obtained by a trader through a conspiracy to defraud the vendor, passed to the assignees on the bankruptcy of the former; (*Milward* v. *Forbes*, 4 Esp. 171.) But this is contrary to the principle that, where there is fraud, the property is not changed; and the case appears to be overruled by *Gladstone* v. *Hadwen*. And see *Harrison* v. *Walker*, Peake, 111; *Abbotts* v. *Bury*, 2 B. & B. 369; *Kilby* v. *Wilson*, 1 Ry. & M. 178.]

of obtaining the goods, the vendee had a preconceived design not to pay for them, having given, by way of fictitious payment, a check upon his bankers, which was not honoured, because he had overdrawn his account many months (*p*). So it is, where, at the time of giving the check, the purchaser had no reasonable ground to expect that it would be paid (*q*). But it was held, that the vendor could not maintain an action for goods sold and delivered, which were to be paid for by a bill, if the agreement was, that the vendee was not to be liable in the event of the bill not being paid (*r*). And assumpsit cannot be maintained before the time of credit has expired, although there be a clear case of fraud; as, where the vendee gave bills in payment, which he had obviously no intention of discharging, having immediately sold the goods off at reduced prices (*s*). The vendor ought, under such circumstances, to treat the con-

(*p*) *Bristol* (*Earl*) v. *Wilsmore*, 1 B. & C. 514. Whether the vendee had such a preconceived design is a question of fact which ought to be left to the jury; *per Abbott*, C. J., *ibid.* 521. See *Kilby* v. *Wilson*, 1 Ry. & Moo. 178; *Irving* v. *Motley*, 5 M. & Payne, 380; S. C. 7 Bingh. 543.

(*q*) *Hawse* v. *Crowe*, 1 Ry. & M. 414.

(*r*) *Read* v. *Hutchinson*, 3 Campb. 352, *cor.* Lord *Ellenborough*, C. J. [But his lordship observed, that, if the defendant knew at the time that the bill was worth nothing, the vendor might have maintained case for deceit, or trover.]

(*s*) *Fergusson* v. *Carrington*, 9 B. & C. 59; *Strutt* v. *Smith*, 1 Cr. M. & Rosc. 312; *De Symons* v. *Minchwich*, 1 Esp. 430.—Post.

tract as null, and bring trover for the goods (*t*); because, if he confirms the contract at all, he must confirm it altogether, and he will not be allowed to substitute a contract different in effect.

Goods obtained by threats.

Where the vendee obtains the goods by threats, either to the person or goods, even if there have been a colourable sale by the payment of some portion of the value, no property passes by the sale (*u*). So, where the vendor is under duress at the time, he may afterwards avoid the sale (*x*).

3. *Fraud against Third Parties.*

Fraud against strangers.

If the sale be fraudulent against third parties, it cannot be enforced. The principal class of cases is, where the conveyance is fraudulent against creditors; but as such sales are the subject of statutory enactment, they have already come under consideration (*y*). On the same principle, where the sale is merely colourable, in order to protect the goods from an anticipated distress, it is null and void (*z*).

(*t*) 9 B. & C. 60, *per Parke*, B. See below, Book II. Part 1, Chap. iv. Of Trover by Vendor.

(*u*) *Simon's* Case, 2 East, P. C. 712; 2 Russ. Crim. L. 712.

(*x*) Bac. Abr. *Duress*, A; 2 Inst. 483. See *Astley* v. *Reynolds*, 2 Stra. 915.

(*y*) Chap. iii. Part 5; p. 98. [Lord *Mansfield*, C. J. said, that "the principles and rules of the common law are so strong against fraud in every shape, that the common law would have attained every end proposed by the statutes 13 Eliz. c. 5, and 27 Eliz. c. 4," Cowp. 434.]

(*z*) *Howell* v. *White*, 1 M. & Rob. 400.

Where a friend of the defendant had agreed to give the plaintiff a certain sum, which he understood to be the full purchase-money, for goods, in advancement of defendant, it was held, that any secret agreement, between plaintiff and defendant, that the latter should pay a further sum, was a fraud upon the friend, and that the plaintiff could not recover (*a*). Where there is a fraud upon the real owner of the property transferred, as, where stock is sold under a forged power (*b*), the property is not changed by the sale. And, even in the case of sales in market overt, although the general rule is, that the property is vested in the purchaser against the whole world, however tortious may have been the possession of the seller (*c*), yet, if the purchaser be *particeps criminis*, the sale will not be binding, and the owner may retake the property; as, where the purchaser knows that the seller is not the rightful possessor (*d*), or where he has given no valuable consideration for the goods (*e*).

Fraud against the crown.

In an action brought against the sheriff for seizing goods, it appeared, that a voluntary bill of sale had been made of the goods to the plaintiff

(*a*) *Jackson* v. *Duchaire*, 3 T. R. 551; *Pidcock* v. *Bishop*, 3 B. & C. 605. See *Cockshot* v. *Bennett*, 2 T. R. 763; *Wyburd* v. *Stanton*, 4 Esp. 179.

(*b*) *Marsh* v. *Keating*, 1 Bingh. N. S. 198.

(*c*) See below, Chap. vi.

(*d*) 2 Inst. 713; 2 Bl. Comm. p. 450.

(*e*) *Ibid.*—Post.

by his father, the former owner, who was in Newgate at the time, and was afterwards executed for felony:—the Court held, that the sale was void, being with the intent to defraud the king(*f*). But Holt, C. J., said, that a *bonâ fide* sale for valuable consideration would have been valid; because the party had a property in his goods until conviction.

SECTION II.—*Of Sales void on the ground of Immorality.*

Immoral contracts.

Contracts arising out of an immoral transaction, or entered into for the furtherance of some immoral purpose, cannot in general be enforced(*a*); for the maxim of law is, "*ex turpi causâ non oritur actio*"(*b*). Thus, in a case where the defendant was proved to have given a general order for "all the caricatures that had ever been published," it was held that the plaintiff could not recover the value of prints furnished of an obscene, immoral,

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(*f*) *Jones* v. *Ashurst*, Skinner, 357; S. P. *Morewood* v. *Wilkes*, 6 C. & P. 144; *Shaw* v. *Bran*, 1 Stark. N. P. C. 319.

(*a*) *Walker* v. *Perkins*, 3 Burr. 1568; S. C. 1 Bl. Rep. 517; *Poplett* v. *Stockdale*, 1 Ry. & M. 337; *Stockdale* v. *Onwhyn*, 5 B. & C. 173; *Gale* v. *Leckie*, 2 Stark. N. P. C. 107.

(*b*) Yet, in general, however immoral or otherwise illegal a contract may be, if it has been completed and the money paid, no action will lie to recover back the money, when both parties are *in pari delicto*; on the principle of the maxim, "*potior est conditio defendentis.*" See *Howson* v *Hancock*, 8 T. R. 575; Bull. N. P. 132.

or libellous character (*c*). So, it has been held to be a good defence to an action for use and occupation, that the house was let for the purposes of prostitution (*d*); especially if the plaintiff participated in the guilty profits (*e*).

But the vendor may recover for clothes sold to a prostitute, though he had notice of her abandoned way of life, unless he has done something expressly in furtherance of it, and expected to be paid out of the profits of prostitution (*f*). So, it was held that a washerwoman might recover for washing clothes for a prostitute, though the articles principally consisted of expensive dresses, and the plaintiff knew to what purposes they were intended to be applied (*g*).

SECTION III.—*Of Sales void, as being against Public Policy.*

Sales of goods and chattels, void on the ground of express statutory prohibition, have been already considered (*a*); but, even where there is no

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(*c*) *Fores* v. *Johnes*, 4 Esp. 97.

(*d*) *Jennings* v. *Throgmorton*, Ry. & M. 251; *Girardy* v. *Richardson*, 1 Esp. 13; S. C. 1 B. & P. 340; *Crisp* v. *Churchill*, cited 1 B. & P. 340; *Appleton* v. *Campbell*, 2 C. & P. 347.

(*e*) *Howard* v. *Hodges*, 1 Selw. N. P. 68, (6th Ed.)

(*f*) *Bowry* v. *Bennett*, 1 Campb. 348.

(*g*) *Lloyd* v. *Johnson*, 1 B. & P. 340; See the remarks of *Buller*, J.

(*a*) Chap. iii. Part 3; p. 84.

Sales against public policy, void.

positive enactment, a contract may be void at common law, on the ground of being contrary to the principles of public policy (*b*). Thus it was held, that no action could be maintained on a contract, for the sale of the command of a ship employed in the service of the East India Company, entered into without the knowledge of the Company (*c*). So, where the plaintiff had contracted to sell to the defendant a share in a ship destined to export military stores to South America, contrary to an order of council then in force, it was held that, as nothing appeared to prove that the illegal purpose had subsequently been either legalized or abandoned, the vendor could not recover (*d*). But he might have recovered, had a licence been subsequently obtained, or any other act done to legalize the adventure (*e*).

(*b*) See *Josephs* v. *Pebrer*, 1 C. & P. 341; *Bristow* v. *Waddington*, (in error) 2 N. R. 355; *Jones* v. *Randall*, Cowp. 39; *Allan* v. *Hearn*, 1 T. R. 56; *Atherford* v. *Beard*, 2 T. R. 610; *Wyatt* v. *Bulmer*, 2 Esp. 537; *Hartley* v. *Rice*, 10 East, 22; *Mitchell* v. *Reynolds*, 1 P. Wms. 181; *Bridge* v. *Cage*, Cro. Jac. 103; *De Begnis* v. *Armitage*, 10 Bingh. 107; Chit. Bills, p. 74, (6th Ed.)

(*c*) *Blachford* v. *Preston*, 8 T. R. 89; see 4 Ves. Jun. 815. And see *Card* v. *Hope*, 2 B. & C. 661; *Battersby* v. *Smyth*, 3 Madd. 110; *Garforth* v. *Fearon*, 1 H. Bl. 327; *Parsons* v. *Thomson*, 1 H. Bl. 322; *Stackpole* v. *Earle*, 2 Wils. 133; *Walker* v. *Chapman*, Lofft, 342.

(*d*) *Holland* v. *Hall*, 1 B. & A. 53.

(*e*) See *Sewell* v. *Roy. Exch. Company*, 4 Taunt. 856; *Haines* v. *Busk*, 5 Taunt. 521; S. C. 1 Marsh. 191.

It has been held, that where a brewer enters into an agreement with a publican to supply him with beer, and the latter agrees to take all his beer, the agreement cannot be enforced, unless the brewer can prove that he has supplied good liquor, and such as to give general satisfaction to customers (*f*). A publican cannot recover the value of beer furnished to third parties by the order of a person who has been in the habit of becoming intoxicated in his house (*g*).

Wagering speculation.

A gambling contract cannot be enforced. Where the agreement is, that the goods shall be delivered by a certain day, and the vendor, at the time of the contract, neither has the goods in his possession, nor has any reasonable expectation of obtaining them by consignment, but intends to go into the market and buy them, this, it seems, will be considered a wagering and improper speculation, and the vendor cannot maintain an action for non-performance of the contract (*h*). On a similar principle the sale is void, when it is proved to have been merely colourable, and intended to cover an usurious loan (*i*).

(*f*) *Holcombe* v. *Hewson*, 2 Campb. 391. See *Cooper* v. *Twybill*, 3 Campb. 286, n.; *Hartley* v. *Pehall*, Peake, 131; *Thornton* v. *Sherratt*, 8 Taunt. 529.

(*g*) *Brandon* v. *Old*, 3 C. & P. 440; *cor. Best*, C. J.

(*h*) *Bryan* v. *Lewis*, 1 Ry. & M. 386. See *M'Gregor* v. *Lowe*, 1 Ry. & M. 57; *Hibberd* v. *Pettispierre*, and *Wardle* v. *Fowler*, cited Comyn, Contracts, 58, note (*p*).

(*i*) *Hargreaves* v. *Hutchinson*, 2 Ad. & Ell. 12.

Trading with an enemy.

Trading with an alien enemy is now decided to be illegal, as being contrary to public policy; and no action can be maintained on any contract arising out of such commerce (*k*). The question of who is to be considered an alien enemy is not an abstract question of either law or fact to be decided by a court of justice, but depends on the declared will of the government. "It belongs to the government of the country to determine, in what relation of peace or war any other country stands towards us" (*l*); therefore, when the king, by an order in council, declared certain ports, formerly hostile, to be not hostile, this declaration, though made for collateral and limited purposes, was held to have the effect of legalizing a trading to such ports, without the aid of any special licence (*m*). So, even where a state was in the military possession of a hostile power, but the government chose to recognize the subjects of such state as neutrals, a trading with them was held legal (*n*).

Legalized by a licence.

On this principle, by a licence granted by the crown to any merchant or company to carry on

(*k*) *Potts* v. *Bell* (in error in K. B.), 8 T. R. 548, reversing the decision of C. P. in *Bell* v. *Gilson*, 1 B. & P. 345. See *Gist* v. *Mason*, 1 T. R. 85, *per* Ld. *Mansfield*, C. J.; *Willison* v. *Patteson*, 7 Taunt. 439; 2 Rol. Abr. 173.

(*l*) *Per* Ld. *Ellenborough*, C. J., 15 East, 90.

(*m*) *Blackburne* v. *Thompson*, 15 East, 81; *Johnson* v. *Greaves*, 2 Taunt. 344.

(*n*) *Hagedorn* v. *Bell*, 1 M. & S. 450.

trade with the subjects of an enemy's country, the adventure will be legalized (*o*); provided that the party, seeking to protect himself under the licence, has conformed to its requisitions (*p*). The licence will have the effect of legalizing the whole transaction, and will therefore protect the rights of an enemy-vendor, and empower him (or his agent) to stop the goods *in transitu*, in the event of the insolvency of the consignee (*q*).

Construction of licence.

Such a licence may be granted, not only to British subjects, but to neutrals resident here or abroad (*r*), or even to alien enemies (*s*). The Courts will give it a liberal construction; and if its terms are general in respect of the persons privileged, it will be held to extend to the merchants even of hostile countries (*t*). So, if the terms are general as to the property privileged, the Courts

(*o*) *Vandyck* v. *Whitmore*, 1 East, 475; 43 Geo. III. c. 153, s. 16; 48 Geo. III. c. 126, s. 2; Long, p. 94.

(*p*) *Vandyck* v. *Whitmore*, 1 East, 475.

(*q*) *Fenton* v. *Pearson*, 15 East, 419. See *Kensington* v. *Inglis*, 8 East, 273; *Morgan* v. *Oswald*, 3 Taunt. 554.

(*r*) *Anthony* v. *Moline*, 5 Taunt. 711; *Schnakoneg* v. *Andrews*, 5 Taunt. 716.

(*s*) *Usparicha* v. *Noble*, 13 East, 332; *Robinson* v. *Morris*, 5 Taunt. 720; *Waring* v. *Scott*, 4 Taunt. 605; *Grigg* v. *Scott*, 4 Campb. 339; S. C. Holt, N. P. C. 129.

(*t*) *Flindt* v. *Scott* (in error), 5 Taunt. 674; *Feise* v. *Bell*, 4 Taunt. 4; *Robinson* v. *Touray*, 1 M. & S. 217; *Hagedorn* v. *Reid*, 1 M. & S. 567; *Hullman* v. *Whitmore*, 3 M. & S. 337; *Rucker* v. *Ansley*, 5 M. & S. 25; *Fayle* v. *Bourdillon*, 3 Taunt. 546.

will not confine it to the property of the licensee (*u*). But, if the licence is expressly restricted to the property of the licensee, no property in which he has not an interest will be protected (*x*); even if he have assigned the licence to the owner of such property (*y*). And even in the case of a general licence, the party, seeking to protect himself under it, must give some evidence to connect his own particular adventure with such general licence (*z*).

Extent of licence.

In order to legalize the adventure, the licence must extend through the whole period. If it has not been obtained until after the adventure has commenced, it will not legalize the voyage by a retrospective effect (*a*). If, by the terms of the licence, it is to expire within a specified time, it is not sufficient that the goods have been shipped within the time; the voyage will not be protected, unless the ship has sailed (*b*), and received her

(*u*) *Defflis* v. *Parry*, 3 B. & P. 3; *Timson* v. *Merac*, 9 East, 35; *Morgan* v. *Oswald*, 3 Taunt. 554.

(*x*) *Feise* v. *Waters*, 2 Taunt. 248; *Busk* v. *Bell*, 16 East, 3. It is sufficient if he have a mere qualified interest; 2 Taunt. 251; *Rawlinson* v. *Jansen*, 12 East, 223.

(*y*) *Feise* v. *Thomson*, 1 Taunt. 121; *Feise* v. *Newnham*, 16 East, 197.

(*z*) *Barlow* v. *M'Intosh*, 12 East, 311.

(*a*) *Henry* v. *Staniforth*, 4 Campb. 270. See *Hobbs* v. *Hannam*, 3 Campb. 95.

(*b*) *Vandyck* v. *Whitmore*, 1 East, 475.

clearing-note (*c*), before the expiration of the time limited. But, where the parties have not been guilty of any fraud or *laches*, and have been prevented from carrying the licence into literal execution by adverse winds, or other circumstances over which they could have had no control, the voyage will be legalized, though the vessel may have been detained beyond the limited time (*d*).

Wilful misdescription invalidates licence.

A wilful misdescription of the licensee will have the effect of invalidating the licence; as, where one, resident in Heligoland, is described to be a merchant of London (*e*), or, where a firm of Amsterdam is described to be of Birmingham (*f*). But if the misdescription is not with fraud and design, the licence will not be vacated (*g*).

(*c*) *Williams* v. *Marshall*, 6 Taunt. 390, 7 Taunt. 468; *Tullock* v. *Boyd*, cited 7 Taunt. 468, and 1 B. Moore, 170, n.

(*d*) *Groning* v. *Crockett*, 3 Campb. 83; *Schroeder* v. *Vaux*, 15 East, 52; *Freeland* v. *Walker*, 4 Taunt. 478; *Leevin* v. *Cormac*, 4 Taunt. 483, n.; *Siffken* v. *Glover*, 4 Taunt. 717; *Siffken* v. *Allnut*, 1 M. & S. 39; *Effurth*, v. *Smith*, 5 Taunt. 329.

(*e*) *Klingender* v. *Bond*, 14 East, 484. [In this case the misdescription was not wilful; but the case is expressly overruled by *Lemcke* v. *Vaughan*, infra.]

(*f*) The *Jonge Klassina*, 5 Rob. Adm. 297.

(*g*) *Lemcke* v. *Vaughan*, 1 Bingh. 473; S. C. 8 B. Moore, 646; (affirmed in error) 7 D. & R. 236.

CHAP. V.

OF SALES BY PUBLIC AUCTION.

SECTION I.— *What renders a Sale by Auction void.*

Auctions are within Statute of Frauds.

SALES by auction are decided to be within the statute of Frauds (*a*), and, therefore, require the solemnities which that statute enjoins, as much as sales of less publicity (*b*).

Puffing.

Puffing, or fictitious bidding in order to enhance the price, if done clandestinely, will vitiate the

Fraud.

sale (*c*). The employment of even a single person to bid, without giving notice, is fraudulent (*d*). Where the owner of a horse stationed his servant at an auction, and employed him to make repeated biddings above the sum bid by a *bonâ fide* pur-

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(*a*) *Emmerson* v. *Heelis*, 2 Taunt. 38; *Kenworthy* v. *Schofield*, 2 B. & C. 945; Supra. [Sales of lands by auction are within the statute; *Blagden* v. *Bradbear*, 12 Ves. Jun. 466; *Stansfield* v. *Johnson*, 1 Esp. 101; *Walker* v. *Constable*, 2 Esp. 659; and see Sugd. Vend. p. 109, (9th Ed.) and cases there cited in note (*n*).]

(*b*) Vid. supra, Chap. iii. p. 53.

(*c*) *Howard* v. *Castle*, 6 T. R. 642; *Rex* v. *Marsh*, 3 Y. & Jer. 331; see Sugd. Vend. p. 23, 9th Ed.

(*d*) *Wheeler* v. *Collier*, 1 M. & Malk. 123.

chaser, it was held that the contract could not be enforced against a subsequent bidder (*e*). And where an auctioneer has received secret instructions not to let the goods be sold below a certain sum, it is a fraud which vitiates the contract (*f*).

Notice to bidders.

But if due notice be given of the intention of the owner to bid, or to employ an agent to bid in his behalf, there is no fraud or unfairness in the transaction to vitiate the sale (*g*); even if there are no real bidders except the purchaser himself (*h*). So, the seller is at liberty to instruct the auctioneer to *set up* the goods at a particular sum and not below (*i*). But if the sale be declared to be *without reserve*, it seems that fictitious bidding will not under any circumstances be justifiable (*k*).

Misdescription.

Where there is a fraudulent misrepresenta-

(*e*) *Crowder* v. *Austin*, 3 Bingh. 368; S. C. 2 C. & P. 208.

(*f*) *Bexwell* v. *Christie*, 1 Cowp. 395.

(*g*) *Conolly* v. *Parsons*, 3 Ves. Jun. 625, n.; *Bramley* v. *Alt*, 3 Ves. Jun. 620. [It seems to be held, in respect of sales of estates at least, that the absence of notice is not fraudulent, provided the intention was not to enhance the price unfairly, but to prevent a sale below the just value, and provided the purchaser is not the only real bidder; *Conolly* v. *Parsons*, supra; *Smith* v. *Clarke*, 12 Ves. Jun. 477; see Sugd. Vend. p. 23. Puffing, however, is not favoured in equity, and the Court will not countenance a demand of commission, for attending at an auction to enhance the price of goods; *Walker* v. *Gascoyne*, Vin. Abr. *Frauds*, A. a.; *Walker* v. *Nightingale*, 4 Bro. P. C. 193.]

(*h*) *Oldfield* v. *Round*, 5 Ves. Jun. 508.

(*i*) *Bexwell* v. *Christie*, 1 Cowp. 395.

(*k*) *Meadows* v. *Tanner*, 5 Madd. 34.

tion of the quality of the goods, or other material misdescription, in the catalogue of sale, the contract is void;—as, where they are falsely described to be "the goods of a gentleman deceased, sold by order of his executors" (*l*). It is notoriously a frequent custom, when the property of some person well known is about to be sold, to sell, at the same time, quantities of goods belonging in reality to other persons, in order that they may fetch a higher price. This seems sufficient to avoid the sale (*m*).

Concealment.

A fraudulent concealment of something, which ought to be communicated, renders the sale void (*n*). So it is if a material fact be suppressed, although there may have been no fraud on the part of the seller (*o*). Where the defendant was allowed to retain an erroneous impression, that the painting, offered for sale, had been in the possession of a gentleman, several of whose pictures were sold at the same time, Lord Ellenborough held the sale to be void (*p*).

Fraud of purchaser.

As the vendor is not permitted to resort to

(*l*) *Per* Lord *Mansfield*, C. J., in *Beswell* v. *Christie*, 1 Cowp. 397; see *D. of Norfolk* v. *Worthy*, 1 Campb. 340.

(*m*) See Mr. *Bradshaw's* case, alluded to by Lord *Mansfield*, C. J., 1 Cowp. 397.

(*n*) See *Early* v. *Garrett*, 9 B. & C. 932; *per Bayley*, J.

(*o*) *Stevens* v. *Adamson*, 2 Stark. N. P. C. 422.

(*p*) *Hill* v. *Gray*, 1 Stark. N. P. C. 434. See further of Fraud, *supra*, p. 129—138.

fraudulent modes of enhancing the price, so the vendee must not unfairly attempt to depreciate the value. Therefore, where the purchaser deterred the company present from bidding, by stating to them that he had a claim against the owner of the barge put up by auction, and a friend of the purchaser's was the only other bidder, the sale was held void (*q*).

SECTION II.— *When the Sale by Auction is complete.*

Fall of the hammer completes the contract.

When there are no circumstances to vitiate the sale, the knocking down of the hammer completes the contract; but until then the buyer is at liberty to retract his bidding at any moment. Every bidding is but an offer on one side, which is not binding on either until it is assented to (*a*); the general rule being, that an offer may always be retracted before acceptance (*b*). Perhaps the buyer may retract his bidding, in those cases where a memorandum in writing is required by the statute, at any time before the auctioneer has actually

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(*q*) *Fuller* v. *Abrahams*, 3 B. & B. 116; see *Levi* v. *Levi*, 6 C. & P. 239.

(*a*) *Payne* v. *Cave*, 3 T. R. 148.

(*b*) *Cooke* v. *Oxley*, 3 T. R. 653; *Routledge* v. *Grant*, 4 Bingh. 653.—Post.

made the entry (*c*). But the retractation must be made loud enough to be heard by the auctioneer; otherwise it amounts to nothing, and is the same as a thought confined to his own breast (*d*).

As the knocking down of the hammer is the act which completes the bargain, a separate contract, both in law and fact, arises for each lot; and in a special action for refusing to adhere to the conditions of sale, the plaintiff was nonsuited, because in the declaration the several contracts were consolidated (*e*). But where goods, although belonging to separate parties, are sold in one lot, and at an entire price, the contract is entire (*f*).

SECTION III.—*Of the Particulars and Conditions of Sale.*

Written conditions cannot be varied by parol.

The written or printed conditions of sale evidence the terms of the contract between party and party (*a*); and it has been repeatedly determined, that the verbal declarations of the auctioneer, at

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(*c*) See 2 Stark. Ev. 869 (2nd Ed.), where the learned author makes the *quære.*

(*d*) *Per Alexander*, C. B., *Jones* v. *Nanney*, M'Clel. 39.

(*e*) *James* v. *Shore*, 1 Stark. N. P. C. 430; *Roots* v. *Lord Dormer*, 4 B. & Adol. 77; see 2 Taunt. 47. [The case of *Chambers* v. *Griffith*, 1 Esp. 150, *contra*, cannot be supported as an authority, Sugd. Vend. 293 (9th Ed.)]

(*f*) *Symonds* v. *Carr*, 1 Campb. 361.

(*a*) 2 Cr. & Jer. 416.

the time of the sale, cannot be given in evidence by either side to contradict them (*b*). Men cannot tell what contracts they enter into, if the written conditions of sale are to be controlled by the babble of the auction-room (*c*). It is an useful and proper general rule, that an auctioneer, by parol explanation at the time of the sale, shall not be suffered to vary from the terms of the printed particulars. The rule is attended with no hardship, because it would be easy to obviate any difficulty in case the article sold be different from the description (*d*). A distinction was attempted to be established in a late case, where the original buyer (the plaintiff) had afterwards sold the goods to another person (the defendant): but it was held, that in the case of such sub-sale the rule remained the same (*e*). Perhaps where personal information is given to the purchaser, of a mistake in the particulars, there might be room for the admission of such evidence (*f*); the point, however, has not been mooted in the sale of chattels.

(*b*) *Powell* v. *Edmunds*, 12 East, 6; *Jones* v. *Edney*, 3 Campb. 285; *Gunnis* v. *Erhart*, 1 H. Bl. 289; *Howard* v. *Braithwaite*, 1 Ves. & B. 210; *Higginson* v. *Clowes*, 15 Ves. Jun. 516; *Bradshaw* v. *Bennett*, 5 C. & P. 50; *Shelton* v. *Livius*, 2 Cr. & Jer. 411. See 1 Phil. Ev. 541.

(*c*) *Per* Ld. *Ellenborough*, C. J. 3 Campb. 288.

(*d*) *Per Bayley*, B., 2 Cr. & Jer. 416.

(*e*) *Shelton* v. *Livius*, 2 Cr. & Jer. 411.

(*f*) *Ogilvie* v. *Foljambe*, 3 Mer. 53; Sugd. Vend. p. 33, (9th Ed.); Paley's Pr. & Agent, p. 257, (3d Ed.).

Notice of conditions.

A sufficient notice of the conditions of sale is given to purchasers, by printing and pasting up the conditions under the auctioneer's box. Where the auctioneer announced that the conditions of sale were as usual, and they were proved to have been so pasted up, it was held sufficient (*g*). It is advisable always, that the conditions of the sale should be actually annexed to the catalogue, or clearly referred to in it; otherwise they cannot be connected together so as to charge the purchaser, parol evidence being inadmissible (*h*).

Construction of conditions.

When the conditions of sale provide, that no mis-statement in the particulars shall vitiate the bargain, this will be held to apply only to inadvertent errors, and not to wilful misdescriptions introduced with a view to enhance the price (*i*). When the property to be sold is described in the particulars, the description ought to be accurate, for the buyers act on the faith of the description (*k*). If false, or perhaps even exaggerated, statements, respecting the quality of the goods, or the circumstances under which the sale takes place, be introduced into the particulars, or if im-

(*g*) *Mesnard* v. *Aldgridge*, 3 Esp. 271.

(*h*) *Kenworthy* v. *Schofield*, 2 B. & C. 945, *supra*. [It would seem sufficient, however, if it appear that the vendee must have had notice. See *Bywater* v. *Richardson*, 1 Ad. & Ell. 508.]

(*i*) *D. of Norfolk* v. *Worthy*, 1 Campb. 340; *Leach* v. *Mullett*, 3 C. & P. 115; *Wright* v. *Wilson*, 1 M. & Rob. 209.

(*k*) *Coverley* v. *Burrell*, 5 B. & A. 259.

portant circumstances be fraudulently omitted, the bidder will not be compelled to complete his purchase (*l*).

Construction of particulars.

The particulars will, in general, be construed favourably for the buyer. On the sale of a quantity of hemp by auction, one of the conditions was, that the goods were to be cleared in fourteen days at the buyer's expense: it was held, that this allowed fourteen days to the buyer, but that the seller was bound to deliver immediately on demand (*m*). Where the sale is made public by statute, the seller has no right to make any regulations, in the conditions of sale, respecting the admissibility of persons to become buyers, or, perhaps, to make any conditions at all, except what the statute has positively authorized, where it regulates the deposits, forfeitures, and incapacities of purchasers (*n*).

SECTION IV.—*Of the Auction Duty.*

Duty of five per cent. payable.

A duty of five per cent. is made payable on the sales of goods and chattels by auction.

(*l*) *Vid. supra*, p. 150.

(*m*) *Hagedorn* v. *Laing*, 6 Taunt. 162; S. C. 1 Marsh. 514.

(*n*) *Eagleton* v. *E. I. Company*, 3 B. & P. 55. [The tea sales of the Company were made public by 9 & 10 Will. III. c. 44, s. 69; and all the sales used to be regulated according to 18 Geo. II. c. 26.]

By 43 Geo. III. c. 69, Schedule A., "For every "twenty shillings of the purchase-money, arising "or payable by virtue of any sale at auction, in "Great Britain, of furnitures, fixtures, pictures, "books, horses, and carriages, and all other goods "and chattels whatsoever, and so in proportion "for any greater or less sum of such purchase-"money, to be paid by the auctioneer, agent, "factor, or seller by commission, 10*d.*" And by 45 Geo. III. c. 30, Schedule A., an additional duty is made payable of 2*d.* for every twenty shillings of the purchase-money.

Reductions and exemptions.

The duties on sales by auction for the benefit of the growers, or first purchasers, of sheep's wool, the produce of Great Britain, are reduced to 2*d.* for every twenty shillings of the purchase-money (*a*).

It is enacted, that "all sales of any real or personal estate of any bankrupt, or bankrupts, shall not be liable to any auction duty (*b*).

Another exemption created by statute is, where the property (whether real or personal estate) is *bonâ fide* bought in by the owner or his agent; provided a written notice be given to the auctioneer, before the bidding, by the owner, or (if an agent is appointed) both by the owner and his agent; and provided the notice be verified on oath by the auctioneer, as also the fairness of the trans-

(*a*) 55 Geo. III. c. 142, s. 1.
(*b*) 6 Geo. IV. c. 16, s. 98.

action to the best of his knowledge and belief (*c*). If an auction is rendered void by inability of the seller to make out a good title to the property, the commissioners of excise are authorized to remit the auction duty (*d*).

Duty payable by vendor unless otherwise stipulated.

By the words of the statute, the vendor (or his agent) is made the party liable to pay the duty. But, although the duties are imposed by the act on the vendor, he is not restrained from making it a condition of sale, that the whole or part of the duty shall be paid by the purchaser over and above the price bidden at the auction (*e*). Where the condition was, that the *purchaser* should pay the duty, the highest bidder, the purchase not having been completed, was held not to be liable (*f*).

SECTION V.—*Of the Duties and Rights of the Auctioneer in respect of Vendor.*

Duty and liability of auctioneer.

The auctioneer is bound to take such due care of the goods, entrusted to him, as he would do if they were his own property; so that, for a loss,

(*c*) 17 Geo. III. c. 50, s. 10; 19 Geo. III. c. 56, s. 12; 28 Geo. III. c. 37, s. 20; 42 Geo. III. c. 93, s. 1. See *Cruso* v. *Crisp*, 3 East, 387; but see 1 Dow. 114. Sugd. Vend. p. 21, (9th Ed.)

(*d*) 19 Geo. III. c. 56, s. 11; 51 Geo. III. c. 95, s. 1.

(*e*) Sugd. Vend. p. 44, (9th Ed.)

(*f*) *Jones* v. *Nanney*, 13 Price, 76; S. C. M'Clel. 25.

arising from misfortune or unavoidable accident, without negligence, he will not be liable (*b*).

It is the duty of the auctioneer, in general, to sell the goods to the highest bidders respectively. No action will lie against him by the vendor for selling at the highest price, though that sum be less than he had been secretly instructed to take (*c*); because, to obey such secret instructions would be a fraud upon the bidders. Otherwise, if the principal had directed him to *set up* the goods at a particular price (*d*). If the auctioneer take upon himself to rescind the contract with a purchaser, he will be liable to his principal for the amount; and if he contends that he was warranted in so doing, the *onus* of proof rests on him, though it involve the proof of a negative (*e*). The vendor may support an action against him for not fully accounting for the proceeds, even if he has suffered the buyer to remove the goods without payment of the full price (*f*). He is *primâ facie* bound to account with his principal; and, if he has acknowledged his principal's title, he will be estopped from setting up a *jus tertii* (*g*).

(*b*) *Per* Lord *Kenyon*, C. J., 1 Esp. 341.

(*c*) *Bexwell* v. *Christie*, 1 Cowp. 395.

(*d*) Id.

(*e*) *Nelson* v. *Aldridge*, 2 Stark. N. P. C. 435.

(*f*) *Brown* v. *Staton*, 2 Chit. Rep. 353.

(*g*) *Crosskey* v. *Mills*, 1 Cr. M. & Rosc. 298. See 1 Esp. 342.

Indemnity.

It seems, that the auctioneer is liable at the suit of the real owner of the goods, where he has sold them, even in ignorance, under the authority of a wrongful claimant (*h*); at all events after notice (*i*). Yet, if the true owner recover against the auctioneer, an action is generally sustainable by him against his principal for indemnity (*k*). Lord Ellenborough held, however, in one case, that, when goods were sold, by the authority of the sheriff, under a writ of *fi. fa.*, there was no implied promise on the part of the sheriff to indemnify the auctioneer (*l*).

Compensation and reimbursement.

When the auctioneer has paid the auction duty, he is entitled to deduct it from the money he has received at the sale, or, if he has received none, to recover the amount from the vendor (*m*). He is entitled to be reimbursed for all necessary expenses, and he may maintain an action against the vendor for reasonable compensation for his services (*n*).

(*h*) *Hardacre* v. *Stewart*, 5 Esp. 103. See the judgment of Ld. *Ellenborough*, C. J. id. 105.

(*i*) Id.; *Loeschman* v. *Machin*, 2 Stark. N. P. C. 311.

(*k*) *Adamson* v. *Jervis*, 4 Bingh. 66. [It is certainly an established rule, that wrongdoers in general cannot have redress or contribution against each other; (see *Merryweather* v. *Nixon*, 8 T. R. 186; *Colburn* v. *Patmore*, 4 Tyrrh. 677): but this rule seems to be confined to cases, where the party seeking redress must be presumed to have known that he was doing an unlawful act. See 4 Bingh. 73; *Betts* v. *Gibbins*, 4 Nev. & Man. 64.]

(*l*) *Farebrother* v. *Ansley*, 1 Campb. 343.

(*m*) Sugd. Vend. p. 18, (9th Ed.); *Spurrier* v. *Elderton*, 5 Esp. 1.

(*n*) It seems, that an unusual rate of *percentage* will not be

But, where he is guilty of such a tortious negligence as renders the sale nugatory, he is not entitled to such claim (*o*); and where he has neglected to take the proper precautions for preventing the auction duty from attaching in the event of the sale going off, he cannot recover the amount of the duty from his principal (*p*).

SECTION VI.—*Of the Duties and Rights of the Auctioneer in respect of Vendee.*

Auctioneer agent for vendee.

It has been already stated, that the auctioneer is decided to be an agent for the vendee, within the Statute of Frauds, in the sale both of real and personal property (*a*). The justness of the doctrine has been questioned (*b*); and, if it were now *res integra*, probably the contrary might be established. It is said, that the bidding aloud of the

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allowed, unless a custom to that effect can be expressly proved. See *Maltby* v. *Christie*, 1 Esp. 339.

(*o*) *Denew* v. *Daverell*, 3 Campb. 451.

(*p*) *Capp* v. *Topham*, 6 East, 392; S. C. 2 Smith, Rep. 443.

(*a*) *Supra*, p. 75.

(*b*) *Emmerson* v. *Heelis*, 2 Taunt. 45, *per Mansfield*, C. J.; *Kemeys* v. *Proctor*, 3 Ves. & B. 59, *per* Sir *W. Grant*, M. R. [The contrary had been expressly decided in the sale of real property, *Stansfield* v. *Johnson*, 1 Esp. 101, *coram Eyre*, C. J.; *Walker* v. *Constable*, 1 B. & P. 306; *Buckmaster* v. *Harrop*, 7 Ves. Jun. 341; *Coles* v. *Trecothick*, 9 Ves. Jun. 234.]

purchaser confers the authority (*e*). Where the purchaser bids by an agent, he will be bound by the auctioneer signing the name of either the principal or agent (*f*). The authority of the auctioneer is altogether determined at the close of the sale; therefore representations, subsequently made by him, are of no effect (*g*).

Where a deposit is paid to the auctioneer, he is considered a stakeholder until the completion of the sale; but after he has paid it over to his principal, without notice, he will not be personally responsible (*h*). However, as long as he has not paid it over, he is liable to the vendee for the amount (*i*), or even if he has paid it, where such payment was wrongful, or after due notice given by the bidder (*k*), or where the auctioneer signed the contract in his own name (*l*). But he is not, in general, liable for interest on the deposit (*m*); nor for damages for the injury arising from the loss of a fancied good bargain (*n*). If the auc- Deposit.

(*e*) 2 Taunt. 47, 48.

(*f*) *Phillimore* v. *Barry*, 1 Campb. 513; *Kenworthy* v. *Schofield*, 2 B. & C. 945. Supra, p. 75.

(*g*) See *Seton* v. *Slade*, 7 Ves. Jun. 276.

(*h*) *Horsfall* v. *Handley*, 8 Taunt. 136.

(*i*) *Burrough* v. *Skinner*, 5 Burr. 2639; See *Berry* v. *Young*, 2 Esp. 640; *Curtis* v. *Greated*, 1 Ad. & Ell. 167.

(*k*) *Edwards* v. *Hodding*, 5 Taunt. 815.

(*l*) *Gray* v. *Gutteridge*, 3 C. & P. 40.

(*m*) *Maberley* v. *Robins*, 5 Taunt. 625; *Lee* v. *Munn*, 8 Taunt. 45; *Harrington* v. *Hoggart*, 1 B. & Ad. 577.

(*n*) *Flureau* v. *Thornhill*, 2 Bl. Rep. 1078.

tioneer accept, as a deposit, a sum of money short of the sum stipulated by the conditions, he cannot afterwards object to its insufficiency (*o*).

When auctioneer personally responsible.

When the auctioneer does not disclose the name of his principal, he himself may be considered the principal, and an action will lie against him for the non-performance of the contract (*p*). The auctioneer was held personally liable to the vendee, where he sold goods, belonging to a bankrupt, under a sheriff's authority, without communicating to the bidders, that there was a dispute concerning the title to the property; the goods having turned out to have been in the possession of the commissioners at the time of the sale (*q*). But, in general, unless there is personal *laches* on the part of the auctioneer, or unless he expressly covenants as principal, he will not be personally responsible; even where he has signed the agreement, provided the vendor afterwards ratifies and sanctions the signature as made in his behalf (*r*).

When liable for misrepresentation.

Although the verbal declarations of the auctioneer, made at the time of the sale, are inadmissible as evidence between the parties to contradict the written or printed particulars (*s*); yet it does not seem a necessary consequence that an action

(*o*) *Hanson* v. *Roberdeau*, Peake, 120.
(*p*) S. C.
(*q*) *Peto* v. *Blades*, 5 Taunt. 657.
(*r*) *Spittle* v. *Lavender*, 2 B. & B. 452.
(*s*) *Supra*, pp. 152, 153.

would not be sustainable by the vendee against the auctioneer for deceit, in which the oral misrepresentations of the auctioneer might be given in evidence (*t*). For, it is well established that, to support an action on the case for deceit, although the *scienter* must be alleged and proved (*u*), it is not necessary that the defendant should himself be a party to the contract, or that he should collude with the person who is, or that he should derive benefit from the deceit (*x*).

When he may sue in his own name.

The auctioneer has a special property in the goods which he is entrusted to sell, and may bring an action for the price against the vendee in his own name (*y*); although the name of the principal be declared at the sale (*z*), and although the sale

(*t*) See *Meyer* v. *Everth*, 4 Campb. 23, where, although a representation by the vendor was held inadmissible in evidence to contradict the terms of the sale note in an action on the contract, Lord *Ellenborough* said the vendee might have maintained a cross action for the deceit. Parol evidence has been admitted, even between the parties, to prove verbal misrepresentations fraudulently made, though a memorandum of the contract had been afterwards drawn up, *Dobell* v. *Stevens*, 3 B. & C. 623. And see *Lysney* v. *Selby*, 2 Ld. Raym. 1118; *Kain* v. *Old*, 2 B. & C. 634.—Post.

(*u*) *Ashlin* v. *White*, Holt, 387; *Tapp* v. *Lee*, 3 B. & P. 367; *Haycraft* v. *Creasy*, 2 East, 92.

(*x*) *Pasley* v. *Freeman*, 3 T. R. 51.

(*y*) See 1 H. Bl. 84; "An auctioneer has a possession coupled with an interest in goods which he is employed to sell, not a bare custody like a servant or shopman;" *Per* Lord *Loughborough*, C. J.

(*z*) *Atkyns* v. *Amber*, 2 Esp. 493.

took place on the premises of the owner (*a*). But where the buyer, after delivery of the goods to him, without notice of any lien or claim which the auctioneer may have upon his principal, settles for the goods with the latter, no action is maintainable by the auctioneer (*b*); nor, where the goods of B. are sold as the goods of A., and the buyer settles for them with A. (*c*). And in the latter case, if the buyer had not settled with A., he might have set off a debt, due to him from A., in an action brought by the auctioneer for the price of the goods of B. (*d*). So, a set-off of a debt due from the owner is allowable in an action brought by the auctioneer, unaffected by the lien of the auctioneer, where he has parted with his lien by delivering the goods without payment (*e*). As the auctioneer can have no greater interest in the goods, than what he derives from his employer, he can only bring an action where his principal could have maintained it; therefore, where the principal is proved not to have been the proper owner, and the true owner asserts his claim, the purchaser is not liable at the suit of the auctioneer (*f*).

(*a*) *Williams* v. *Millington*, 1 H. Bl. 81.

(*b*) *Coppin* v. *Walker*, 7 Taunt. 237.

(*c*) Id.

(*d*) *Coppin* v. *Craig*, 7 Taunt. 243.

(*e*) *Coppin* v. *Craig*, 7 Taunt. 243; S. C. 2 Marsh. 501; *Jervis* v. *Chapple*, 2 Chit. Rep. 387.

(*f*) *Dickenson* v. *Naul*, 4 B. & Ad. 638.

If the auctioneer makes himself a party, by bringing the action in his own name, his memorandum will not be sufficient to bind the purchaser within the Statute of Frauds (*g*); but the signature of the clerk will be sufficient, as the clerk is not considered to be identified with the auctioneer (*h*).

(*g*) *Farebrother* v. *Simmons*, 5 B. & A. 333.

(*h*) *Bird* v. *Boulter*, 4 B & Ad. 443. See above, p. 78.

CHAP. VI.

OF SALES IN MARKET OVERT.

SECTION I.—*Of the alteration of Property in General by a Sale in Market Overt.*

General rule.

THE general rule of law is, that no person can transfer a greater interest in any thing than he himself possesses(*a*). The consequence of this doctrine would be, that a sale by a wrongful possessor could never vest the property in the vendee, however honest might have been the conduct of the latter; the original owner might, at any time, claim and retake the goods. But, for the security of *bonâ fide* purchasers, an exception is made where the sale has taken place in market overt; and it is laid down generally, that "every sale, made in a fair or market overt, transfers a complete property in the thing sold to the vendee; so that, however injurious or illegal the title of the vendor may be, yet the vendee's is good against all men"(*b*). This general rule, however, must be understood with some restrictions.

Exception. Market Overt.

(*a*) 2 Bl. Comm. ch. 30. *Nemo potest plus juris ad alium transferre quàm in ipso est;* Noy's Max. p. 339, (9th Ed.).

(*b*) Bac. Abr. *Fairs*, E.; Hob. 79; 13 Ves. Jun. 122.

What constitutes market overt.

Every shop in the city of London is a market overt every day (except Sundays(*c*)), in respect of goods and chattels usually exposed to sale by their respective owners(*d*). So in Bristol, or elsewhere, by custom(*e*). The Strand was held not to be market overt(*f*). A wharf, even in London, is not market overt, and a sale there does not alter the property against the rightful owner, though goods of the same sort be proved to be usually sold in such wharf(*g*). And, it is said, the king cannot grant that a shop shall be a market overt(*h*). Even in London each shop is not a market overt for goods improper and foreign to the owner's trade, as plate in a scrivener's shop(*i*). So, if horses be sold in Cheapside, or

(*c*) The vendee in pleading must aver and prove that the sale was on a lawful day; *Burch* v. *Scorry*, 12 Mod. 309; *Marshall* v. *Porter*, Vin. Abr. *Market*, K. 3. The stat. 27 Hen. VI. c. 5, makes fairs held on Sundays illegal. See 1 Taunt. 136. [Of contracts of sale, in general, made upon Sunday, *vid. supra*, p. 95.]

(*d*) *Market overt's* Case, 5 Rep. 83*a*; 8 Rep. 127; Godb. 131; *Waggoner* v. *Fish*, 2 Brownl. 284; *Panton* v. *Hassell*, Hetley, 63.

(*e*) Com. Dig. *Market*, E. *Vid. per* Lord *Hardwicke*, C. J., in *Harris* v. *Shaw*, Ca. temp. Hardw. 350; Hetley, 62.

(*f*) *Anon.* 12 Mod. 521.

(*g*) *Wilkinson* v. *King*, 2 Camp. 335. The mere publicity of a sale is not of itself sufficient to bar the real owner. Where goods were wrongfully sold by the sheriff by public auction, the owner recovered in trover against the purchaser; *Farrant* v. ——, 3 Stark. N. P. C. 130.

(*h*) *Clifton* v. *Chancellor*, Moor, 625, *per Cur.*

(*i*) 2 Inst. 713; Vin. Abr. *Market*, *A; *Bishop of Worcester's* Case, Moor, 360; S. C. 1 Ander. 344; Poph. 84; *Palmer* v. *Wolley*, Cro. Eliz. 454; *Taylor* v. *Chambers*, Cro. Jac. 69.

goods in Smithfield (*k*). If the sale be in a covert place within the fair or market, it does not change the property; as, in a back room or warehouse, or behind a hanging or cupboard where a person passing cannot see, or in a shop where the windows are shut up (*l*), or in the night time; for the sale ought to take place between the rising and going down of the sun (*m*).

Who are bound by the sale.

A sale in market overt, it is said, does not bind the king; but the sale by a stranger binds an infant, or a feme covert, whether they possessed the property in their own right, or as executors or administrators; it also binds idiots and lunatics, and persons beyond sea, or in prison (*n*). The sale does not bind the real owner, if he happen to be the purchaser (*o*). So, though several sales have intervened, and the goods come again into the possession of the original trespasser, the owner is not barred, and may retake them (*p*).

Sale not binding, where purchaser is guilty of fraud.

Where there is *covin* on the part of the buyer, the sale is not binding; as, where no consideration for the goods has been given; or, where the parties collude in order to bar the rightful owner; or, where the buyer knows that the seller is not the

(*k*) See note (*i*).
(*l*) *Ibid.*; 2 Rol. Abr. 122, l. 47—53; Dyer, 99 *b*, in marg.
(*m*) 2 Inst. 714.
(*n*) 2 Inst. 713.
(*o*) *Ibid.* Perk. sect. 93.
(*p*) *Ibid.*

rightful possessor(*q*); or, where he knows that the seller is an infant, or a feme covert (unless in respect of goods which she trades with, for, and by the consent of, her husband(*r*)), or a bankrupt(*s*), or a factor(*t*); or, where the contract is not complete in the market overt, as where it is begun there, and finished elsewhere(*u*), or *vice versâ*(*x*). Where no toll is payable, the sale in market overt binds without payment of toll(*y*). But if toll is not paid, where by custom it ought to be paid, it seems doubtful whether the sale would alter the property(*z*); for it is said, for this purpose were tolls established in markets, viz. to testify the making of contracts(*a*).

Pawning of goods, not binding against owner.

The pawning of goods does not alter the property against the true owner(*b*). It is enacted,

(*q*) 2 Inst. 713; *Clifton* v. *Chancellor*, Moor, 624; *Harvy* v. *Facy*, 2 Anderson, 115; Dr. & Stud. 256.

(*r*) 2 Inst. 713; 2 Bl. Comm. 450.

(*s*) *Per Twysden*, J., *Baily* v. *Bunning*, Sid. 272.

(*t*) *Per Holt*, C. J., 12 Mod. 515.

(*u*) 2 Inst. 714; 4 Taunt. 533.

(*x*) Com. Dig. *Market*, E.; Jones, 164; *Anon.*, Dyer, 99*b*, pl. 66; *Frogmer's* Case, *ibid.* in mar.

(*y*) 2 Inst. 714; *Comyns* v. *Boyer*, Cro. Eliz. 485.

(*z*) *Ibid.*; Jenkins, 83, pl. 62; Vin. Abr. *Market*, *A., 9; Bro. Abr. *Property*, pl. 9; *Hodges* v. *Franklin*, Hetley, 49.

(*a*) *Mirroir*, ch. 1. sect. 3; 2 Bl. Comm. 449.

(*b*) *Hartop* v. *Hoare*, 2 Stra. 1187. It was said there could be no market overt for pawning, independently of 1 Jac. I. c. 21; *ib.* 1188. See S. C. 1 Wils. 8; 3 Atk. 44.

that no sale, exchange, pawn, or mortgage, of any goods wrongfully taken or stolen, and which shall be at any time sold, delivered, exchanged, pawned or done away with, in the city or liberties of London, or within two miles thereof, or within Westminster or Southwark, to any broker or pawntaker, shall work any alteration of property(*c*). And it is provided, that, if the owner of goods, unlawfully pawned, make oath of the fact before a justice, and show that there is reason to suspect some particular person, the justice may grant a warrant for searching the house of such person, and he may cause the goods, if found, to be restored to the owner(*d*).

Therefore, where goods are pawned within the limits specified by the statute, the true owner may have his action for the goods, whether he prosecute the trespasser or not(*e*). In an action against a pawnbroker, where the plaintiff had prosecuted the party who had stolen and pawned the goods, but the prisoner had been acquitted of the felony on account of the absence of a material witness, it was held that the action well lay, and the plaintiff had a verdict(*f*). It was formerly the established

(*c*) 1 Jac. I. c. 21, s. 5.

(*d*) 39 & 40 Geo. III. c. 99, s. 13.

(*e*) Kelynge, 50; Plowd. 243.

(*f*) *Packer* v. *Gillies*, 2 Campb. 336, n. But if the owner held out the party pledging the goods as one authorized so to act, he can maintain no action against the pledgee; *Garth* v. *Howard*, 5 C. & P. 346.

doctrine, that, if a factor pledged the goods of his principal, the latter might recover against the pawnee, on paying to the factor what was due to him, without making any tender to the pawnee (*g*). But by statute it is enacted, that the pledgee, even with notice, shall acquire the same right, title, and interest as the factor possessed (*h*). Therefore the principal, in order to redeem, would be bound to tender to the pledgee as much as was due at the time to the factor, but not more (*i*). Pledge by factor.

At common law, if a man whose goods were stolen freshly pursued his appeal against the felon, and convicted him of the felony, he was entitled to restitution (*k*); and it seems that a sale in market overt by the king's officer, or any other party, would not in such case have changed the property (*l*). By a repealed statute (*m*) the right of restitution was further extended, and the owner was entitled to a writ of restitution for the goods and chattels stolen from him, if he himself, or any person by his procurement, gave evidence to convict the felon. Restitution to the owner at common law.

(*g*) *Paterson* v. *Tash*, 2 Str. 1178.—Post, TROVER BY VENDOR, Book II. Part 1, Chap. iv.

(*h*) 6 Geo. IV. c. 94, s. 5.—Post.

(*i*) See *Fletcher* v. *Heath*, 7 B. & C. 517.

(*k*) Com. Dig. *Market*, E.; 2 Inst. 714.

(*l*) *Ibid.*; 1 Hale, P. C. 542; 2 Hawk. P. C. ch. 23, s. 35.

(*m*) 21 H. VIII. c. 11, repealed by 7 & 8 Geo. IV. c. 27.

By statute.

A recent statute contains provisions similar to the above, but more extensive. It is enacted, that the owner shall have the stolen property restored to him, upon the prosecution and conviction of the offender by or on behalf of the owner; except where the property stolen consists of valuable securities, which have been *bonâ fide* discharged, or negotiable instruments, for which a valuable consideration has been paid by any third party without notice (*n*).

Owner's remedy.

The remedy given by the latter statute for the recovery of the stolen property, after the conviction of the offender, is a writ of restitution, and the Court is empowered to order the restitution in a summary manner. The repealed statute also gave a writ of restitution. But this writ was not used in practice (*o*); and if the goods be not restored upon conviction, the owner may maintain trover for them (*p*). Even where they are not the identical goods, but the produce of them, the action will lie (*q*).

Even after a sale in market overt.

It seems clear that, under the statute, the owner upon conviction of the offender shall have resti-

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(*n*) 7 & 8 Geo. IV. c. 29, s. 57.

(*o*) See *per* Lord *Mansfield*, C. J., Lofft, 90. No writ of restitution had been sued out for two centuries; Bac. Abr. *Fairs*, E. 10. The form of the writ is given, Lofft, 91.

(*p*) *Golightly* v. *Reynolds*, Lofft, 88.

(*q*) Ib.; *Harris's* case, Noy, 128; *Holiday* v. *Hicks*, Cro. Eliz. 661; *Hanberrie's* case, cited *ibid.* See 4 Nev. & Man. 430.

tution of the property against even a *bonâ fide* purchaser in market overt (*r*). Blackstone says (*s*), though this may seem somewhat hard upon the buyer, yet the rule of law is that "*spoliatus debet ante omnia restitui;*" especially when he has used all the diligence in his power to convict the felon. And since the case is reduced to this hard necessity, that either the owner or the buyer must suffer, the law prefers the right of the owner, who has done a meritorious action by pursuing the felon to condign punishment, to the right of the buyer, whose only merit is negative, that he has been guilty of no unfair transaction.

Against whom he may bring the action.

But, although the owner is entitled to restitution, upon conviction of the offender by his procurement, the action can be sustained only against the party in possession of the goods at the time of the attainder. Where the defendant had purchased the goods from the felon in market overt, and sold them again before the conviction, although notice of the robbery had been given to him by the plaintiff, the Court gave judgment for the defen-

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(*r*) 2 Inst. 714; Com. Dig. *Market*, E.; 1 Hale, P. C. 543; Kelynge, 35, 48; Bac. Abr. *Fairs*, E. 10; Vin. Abr. *Restitution*, C. 12 (note); 3 Chit. Burn, *Larceny*, VI.; 2 T. R. 755.

(*s*) 4 Comm. ch. 27. [It has been decided, in a very recent case, that he might recover against the defendant, who purchased the goods from the felon by *private sale*, although the defendant had afterwards resold them to a third party in market overt; *Peer* v. *Humphrey*, 4 Nev. & M. 430.]

dant. (*t*) Under the former statute (*u*) it was held that the owner was not entitled to restitution against a pawnee, or other bonâ fide party, paying valuable consideration for goods, if such goods had been obtained by the wrong-doer through *fraud*, or by any other means not amounting to felony; because the words of the statute confined it to the case of felony (*x*). But it seems that the objection would not now be applicable, since the words of the present statute (*y*) are, "any such felony or *misdemeanor* as aforesaid," &c.; and a previous section (*z*) relates to the very case of obtaining goods under false pretences.

SECTION II.—*Of the Buying and Selling of Horses in Market Overt.*

Selling of horses.

With the view of checking the crime of horse-stealing, and of securing the property of owners of horses, certain statutes have provided, that the sale, by a wrongful possessor, even in market overt, shall not have the effect of altering the property

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(*t*) *Horwood* v. *Smith*, 2 T. R. 750.

(*u*) 21 H. VIII. c. 11.

(*x*) *Parker* v. *Patrick*, 5 T. R. 175. See 6 Taunt. 13; *Davis* v. *Morrison*, Lofft, 185; 2 Wm.'s Saund. Rep. 47, e.

(*y*) 7 & 8 Geo. IV. c. 29, s. 57.

(*z*) Id. sect. 53; reciting, that "a failure of justice frequently arises from the subtle distinction between larceny and fraud."

in a horse, unless certain prescribed forms have been duly complied with.

The statute 2 & 3 Phil. & M. c. 7, entitled "An Act against the Buying of Stolen Horses," directs, that in every fair and market a certain open space shall be appointed and limited out for the selling of horses. And that a toll-gatherer shall be appointed for taking, between the hours of ten in the morning and sunset, due and lawful toll for every horse there sold; and he shall write down in a book, kept for the purpose, the description of the horse, and the names and abodes of the parties to the contract (*a*); which book shall be delivered to the chief keeper of the fair or market, who is to make a note of the number of horses sold (*b*).

It is further enacted, that the property in a stolen horse shall not be changed by the sale, made according to such prescribed regulations, unless the horse shall have been openly used, for the space of an hour at the least, in the open space of the said fair or market, where horses are usually sold (*c*). If the provisions of the statute have not been complied with, the owner of a stolen horse may retake, or have an action for the recovery of, the same (*d*).

The statute 31 Eliz. c. 12, entitled "An Act to avoid Horse-stealing," makes further provisions

(*a*) Section 2.
(*b*) Section 3.
(*c*) Section 4.
(*d*) Section 5.

concerning the sale of horses, in protection of owners, reciting, that sundry good ordinances, theretofore made, "had not wrought so good "effect for the repressing or avoiding of horse-"stealing, as was expected." It enacts, that the toll-taker, or chief officer of the fair or market, shall not make an entry of the sale of any horse, unless he will take upon himself perfect knowledge of the seller, or unless some sufficient and creditable person will avouch the seller, and declare of his own knowledge the seller's name, occupation, and residence. And it further provides, that the toll-taker shall enter in his book the price of the horse, and shall furnish a note in writing of the transaction to the buyer (*e*).

Notwithstanding that the prescribed formalities shall have been adopted, it is provided, that the owner of a stolen horse may make claim within six months after the sale, and, upon sufficient proof of his property within forty days after claim, may redeem the horse upon payment, or tender of payment, of the sum *bonâ fide* paid by the buyer (*f*).

If in the sale of a stolen horse the requisites of these statutes have not been duly observed, the sale is utterly void as regards the owner, and he may retake the horse at any distance of time (*g*). Therefore, it was decided that, where the vendor

(*e*) Section 2.
(*f*) Section 4.
(*g*) 2 Bl. Comm. 451.

had entered a wrong name in the toll-book, the property was not altered (*h*). So it is, where the person, vouching the seller, gives a fictitious name (*i*).

The statute extends to horses, wrongfully taken, which have not been stolen (*k*). When the plaintiff let a horse to hire to one, who kept it beyond the time stipulated, and then sold it to the defendant, it was held that the owner might recover against the defendant, though the latter was a *bonâ fide* purchaser for full value (*l*).

It has been decided, that an officer has no authority, by a warrant given upon the mere making of a complaint by the alleged owner before the magistrate, to take the horse out of the possession of a *bonâ fide* purchaser; some ground must be laid for the jurisdiction of the magistrate in an actual felony (*m*). It was ruled by *Best*, C. J., that the plaintiff could not recover, upon proof of the property in the horse, unless he has done everything in his power to convict the felon; a mere

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(*h*) *Gibbs's* case, Owen, 27; *S. C.* 1 Leon. 158; (though it had been ruled *contra*, *Wickes* v. *Morefoot*, Cro. Eliz. 86.) [The buyer, justifying under a sale in market overt, must show who was the vendor; Bro. Abr. *Count.* pl. 78.]

(*i*) *Barker* v. *Reading*, Sir W. Jones, 163; *S. C.* Palm. 485.

(*k*) Com. Dig. *Market*, E.; Burn's Justice, Tit. *Horses*; *Barker* v. *Reading*, Jones, 163.

(*l*) *Shelley* v. *Ford*, 5 C. & P. 313.

(*m*) *Joseph* v. *Adkins*, 2 Stark. N. P. C. 76.

statement of facts before the magistrate is insufficient(*n*).

(*n*) *Gimson* v. *Woodfull*, 2 C. & P. 41. "I take it, the law is this; you must do your duty to the public, before you seek a benefit to yourself. If I were to hold that this action could be maintained under such circumstances, we should have no more criminal prosecutions;" *per Best*, C. J., *id.* See 1 Hale, P. C. 546.

BOOK II.

OF THE RIGHTS, REMEDIES, AND LIABILITIES OF THE PARTIES.

PART I.

RIGHTS AND REMEDIES OF VENDOR IN RESPECT OF VENDEE.

Extra-judicial remedies of vendor.

THE rights and remedies of vendor in respect of vendee may be considered as extra-judicial and judicial:—the former, comprehending the Lien of the vendor for the price of the goods while they remain in his possession (*a*), and the Right of stopping goods *in transitu*, i. e. in their passage to an insolvent vendee, who has not paid the price (*b*):—the latter, including the different actions which the vendor may maintain against the purchaser, to recover, either the goods themselves, or their value, or adequate damages for the breach of contract. The vendor may bring Assumpsit (*c*) on the special contract for not accepting goods; in

Judicial remedies.

(*a*) Part 1, Chap. i. See Montagu on Lien.
(*b*) Part 1, Chap. ii.
(*c*) Part 1, Chap. iii.

which form of action he is entitled to recover, not the full value of the goods, but such damages as he may prove that he has sustained by the non-performance of the agreement. Or, he may bring assumpsit for goods bargained and sold, or for goods sold and delivered; in both of which forms of action he is entitled to recover the full value. Debt also lies for goods sold (*d*); but if counts in debt and counts in assumpsit are joined, it is demurrable (*e*). By framing the action in the form *ex contractu*, the plaintiff affirms the contract (*f*); which he is entitled to do in general, waiving the tort (*g*). But where the vendor, on account of the fraud of the defendant, or other circumstance rendering the contract voidable, elects to rescind the contract and sue for the goods themselves, he may bring Trover (*h*), or Detinue (*i*).

(*d*) *Emery* v. *Fell*, 2 T. R. 28. 1 Chit. Pl. 98.

(*e*) *Brill* v. *Neele*, 3 B. & A. 208; *Dalton* v. *Smith*, 2 Smith, Rep. 618. The word "*promise*" is peculiar to a count in assumpsit, and improper in a count in debt; but the words "*agreed and undertook*" are good in debt; *Gardner* v. *Bowman*, 4 Tyrwh. 412.

(*f*) See *Fergusson* v. *Carrington*, 9 B. & C. 59.

(*g*) *Hill* v. *Perrott*, 3 Taunt. 274.—Post.

(*h*) 9 B. & C. 60. See Part 1, Chap. iv.

(*i*) 1 Chit. Pl. 112. See *Garth* v. *Howard*, 5 C. & P. 346, 350.

CHAP. I.

LIEN OF VENDOR.

"THERE are two species of liens known to the law, viz. particular liens, and general liens. Particular liens are, where persons claim a right to retain goods in respect of labour or money expended upon them; and those liens are favoured in law. General liens are claimed in respect of a general balance of account; and these are founded on custom only, and are therefore to be taken strictly" (*a*). The subject of general lien scarcely claims consideration in reference to the mutual relation of vendor and purchaser. Particular and general lien.

It may be laid down generally, that, where there is no express agreement to the contrary, the vendor has a particular lien for the price upon the chattel sold, until it actually comes into the possession of the purchaser or his agent. Thus, trover cannot be supported by the purchaser to obtain possession of the goods, until he has either General rule.

(*a*) See *per Heath*, J., 3 B. & P. 494, *Houghton* v. *Matthews*. Per *Grose*, J., *Hammond* v. *Barclay*, 2 East, 235. Selw. N. P. 1392, (8th Ed.).

paid or tendered the price; because, to support such action, the plaintiff must have both the right of property and the right of possession; and it will never be intended, in the absence of a specific agreement, that the purchaser was to be entitled to the possession of the goods before payment of the price (*b*). Further, even when the vendor has parted with the possession of the goods, a species of extra-ordinary lien continues until the purchaser has actually obtained possession; so that, if, by the intermediate insolvency of the latter, the vendor should be deprived of the reasonable chance of payment, he may recover possession by stopping the goods *in transitu;* which right forms the subject of the next chapter.

Extra-ordinary lien.

Ordinary lien.

In respect of the *ordinary* lien of the vendor, the subject may be considered;—first, as to where the lien exists; secondly, how it is waived or determined.

Where it exists.

1. *Where the Lien exists.*

The vendor in general has a lien on the goods while remaining in his possession, on the principle, that, wherever a party has bestowed expense or labour upon a particular chattel, he has a claim upon it to the amount of such charge (*c*). And,

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(*b*) See *per Bayley*, B., 2 Cr. & Mees. 511. Of Trover by Vendee, Part 2, Chap. ii.

(*c*) *Bloxam* v. *Sanders*, 4 B. & C. 941; *Ockenden*, ex parte, 1

while the vendor has the possession of the goods, it is immaterial that the purchaser has agreed to pay rent for them; for, although such agreement is an implied transfer of possession for certain purposes (*d*), yet it is not such a transfer or waiver of possession as to bar the vendor's lien (*e*) The lien exists as well in cases of implied contracts, as where there has been an express agreement as to price (*f*): a special agreement does not of itself destroy the right, but only where it contains some term inconsistent with that right (*g*). Upon the principle of lien, the vendor is justified in refusing to deliver goods contracted to be sold, if his chance of payment is taken away by the subsequent insolvency of the purchaser (*h*). If the purchaser becomes bankrupt while the goods are remaining in the vendor's hands, the latter has a lien against the claim of the assignees; therefore, an action cannot be maintained by the assignees without payment of the price (*i*), and of the ware-

Both in express and implied contracts.

Atk. 235; *Franklin* v. *Hosier*, 4 B. & A. 341; *Chase* v. *Westmore*, 5 M. & S. 180; *Wallace* v. *Woodgate*, Ry. & Moody, 194.

(*d*) See *Hurry* v. *Mangles*, 1 Campb. 452.—Post.

(*e*) *New* v. *Swain*, Dan. & Lloyd, Merc. Ca. 193.

(*f*) *Chase* v. *Westmore*, 5 M. & S. 180, (overruling *Brennan* v. *Currint*, and *Collins* v. *Ongley*, cited Bull. N. P. 45, and Selw. N. P. 1397). And see *per Gibbs*, C. J., *Hutton* v. *Bragg*, 7 Taunt. 25.

(*g*) *Per Holroyd*, J., and *Best*, J., *Crawshay* v. *Homfray*, 4 B. & A. 52. See 5 M. & S. 180.

(*h*) *Reader* v. *Knatchbull*, 5 T. R. 218, n.

(*i*) *Bloxham* v. *Sanders*, 4 B. & C. 941; see 4 B. & C. 951.

house duties or other charges to which the purchaser himself would have been liable (*k*).

Not in sale upon credit.

Where the goods are expressed to be sold upon credit, the vendor has no lien (*l*); for, if by the terms of the agreement the party is entitled to have the goods immediately, and the payment in respect of them is to take place at a future time, that is altogether incompatible with the lien or right to retain the goods until payment (*m*). Nevertheless, if the purchaser suffers the goods to remain until the appointed period of payment has elapsed and no payment is in fact made, a lien is created, and the seller has then a right to retain them (*n*).

2. *Where the Lien is waived or determined.*

Lien waived by parting possession.

If the vendor parts with the possession of the goods, the lien will be determined (*o*). So it is a constructive waiver of the lien, if, when the goods are demanded, he claims to retain them on a dif-

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(*k*) *Winks* v. *Hassall*, Dan. & Lloyd, Merc. Ca. 312; S. C. 9 B. & C. 372.

(*l*) *Bunney* v. *Poyntz*, 4 B. & Ad. 568, 573. See *Cood* v. *Pollard*, 10 Price, 109.

(*m*) See *per Holroyd*, J., *Crawshay* v. *Homfray*, 4 B. & A. 52; Dyer, 30, a.

(*n*) *Per Bayley*, J., *New* v. *Swain*, Dan. & Lloyd, Merc. Ca. 195. And see 4 B. & C. 948, 949.

(*o*) *Godfrey* v. *Furzo*, 3 P. Wms. 185; *Jacobs* v. *Latour*, 5 Bingh. 130; *Jones* v. *Pearle*, 1 Str. 557; *Taylor* v. *Robinson*, 8 Taunt. 648. See *Scott* v. *Newington*, 1 M. & Rob. 252.

ferent ground (*p*). And, even if the agreement was, that, after giving up the possession, the vendor should continue to have a claim on the goods until payment, this will be deemed to be only a personal licence, and cannot be enforced against any one except the purchaser himself (*q*).

But not by part-delivery.

A delivery, however, of *part* of the goods does not divest the vendor's lien in respect of the residue remaining in his possession (*r*); provided that it does not appear that such part-delivery was expressly intended to be by way of delivery of the whole (*s*). Therefore, where a part has been delivered either to the vendee, or to a sub-vendee, on the dishonour of acceptances given in payment by the former, neither the vendee nor the sub-vendee can maintain an action to recover the part remaining in the possession of the original vendor or of a bailee on his behalf, for the vendor's lien thereon still continues (*t*). But it is otherwise, where the

(*p*) *Boardman* v. *Sill*, 1 Campb. 410, n. But it is not a sufficient ground to imply a waiver of the right, that he has merely *omitted* making claim in respect of it; *White* v. *Gainer*, 2 Bingh. 23.

(*q*) *Howes* v. *Ball*, 7 B. & C. 481.

(*r*) *Miles* v. *Gorton*, 2 Cr. & Mees. 504; *Payne* v. *Shadbolt*, 1 Campb. 427.

(*s*) *Bunney* v. *Poyntz*, 4 B. & Ad. 568; see 9 B. & C. 372.

(*t*) *Dixon* v. *Yates*, 5 B. & Ad. 313; S. C. 2 Nev. & Man. 177; *Miles* v. *Gorton*, 2 Cr. & Mees. 504. [*Qu.?* whether these decisions overrule *Green* v. *Haythorne*, 1 Stark. N. P. C. 447, 450. In this case the *whole* of the goods for which the action was brought had been resold, and a part delivered; so that the

Unless intended as delivery of the whole.

delivery of part was clearly intended as a delivery of the whole, and where the purchaser had free access to the residue undelivered, and might have removed it whenever he chose. Thus, in a case where, on the sale of certain trees, the cubical admeasurement of each had been ascertained, and the trees were marked and part removed, it was held that the vendor's lien was determined (*u*).

Not waived by verdict for goods bargained and sold.

It has been held that, by obtaining a verdict for goods bargained and sold, the vendor did not waive his lien; though it might have been otherwise if it had been for goods sold and *delivered* (*x*): because that would seem to amount to an implied acknowledgement that the purchaser had the right of possession. The lien is lost by taking in payment a bill of exchange, and negociating it, although such payment may have been objected to at the time (*y*).

When lien revives.

It seems that, in general, if possession has been given up, and the lien is once gone, it is altogether lost (*z*); but if the goods remain in the possession

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question concerning the residue undelivered was not between the original parties, but entirely between the sub-vendee and the original vendor. The original purchaser had become insolvent, and the vendor did not notify his dissent until after the insolvency. Held, that he had lost his lien.]

(*u*) *Tansley* v. *Turner*, 2 Bingh. N. S. 151.

(*x*) *Houlditch* v. *Desange*, 2 Stark. N. P. C. 337.

(*y*) *Horncastle* v. *Farran*, 3 B. & A. 497; S. C. 2 Stark. N. P. C. 590.

(*z*) See *Hartley* v. *Hitchcock*, 1 Stark. N. P. C. 408; *Good-*

of the vendor, the lien may be suspended by circumstances, and may afterwards revive (*a*). Where a party resumes possession of goods wrongfully and by misrepresentation, the lien will not be revived, although otherwise he might have been entitled to it (*b*).

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hart v. *Lowe*, 2 Jac. & W. 352. But see *Levy* v. *Barnard*, 8 Taunt. 149; *Wallace* v. *Woodgate*, 1 Ry. & Moo. 193.

(*a*) See *per Bayley*, B., 2 Cr. & Mees. 510.

(*b*) *Madden* v. *Kempster*, 1 Campb. 12; *Whitehead* v. *Vaughan*, Co. B. L. 547.

CHAP. II.

STOPPAGE IN TRANSITU.

Use of the term.

THE term stoppage *in transitu* is occasionally used to signify any act done by the owner of goods, or by a party entitled to a lien upon goods, by which some adverse right is prevented from vesting. Thus, the expression has been used, in reference to the countermanding of a consignment in order to prevent the general lien of a factor from attaching upon the goods (*a*);—also, in reference to a bailee, after having parted with the possession, resuming it in order to regain his lien (*b*);—also, in reference to the countermanding of a remittance sent by a debtor to a creditor, who had subsequently become insolvent (*c*);—and in a few other instances (*d*). But it has been well observed (*e*), that the term has now acquired a distinct technical meaning, to which it ought to be

Proper signification.

(*a*) Paley, Pr. & A. 137; *Kinloch* v. *Craig*, 3 T. R. 119.

(*b*) *Sweet* v. *Pym*, 1 East, 4.

(*c*) *Smith* v. *Bowles*, 2 Esp. 578.

(*d*) See *Edgar* v. *Fowler*, 3 East, 225, *per* Lord *Ellenborough*, C. J.; *Gurney* v. *Sharp*, 4 Taunt. 245.

(*e*) Paley, Pr. & A. 137, Editor's Note, (3d Ed.) *Vid. per Cur.* 3 T. R. 787.

confined; to wit, the right, which an unpaid vendor possesses, of stopping goods on their way to an insolvent vendee.

Origin of the right.

The doctrine of stopping in transitu, it is said, owes its origin to Courts of Equity, but has since been adopted and established by a variety of decisions in Courts of Law, and is now regarded with favour as a right, which those Courts are always disposed to assist (*f*). The first case, in which the doctrine was acknowledged in a Court of Law, seems to be the case of the *Assignees of Burghall* v. *Howard* (*g*). The action was brought by the assignees of the bankrupt-vendee against the defendant (in whose vessel the goods had been shipped), for refusing to deliver the cargo on the ground that the delivery had been countermanded by the consignor. Lord *Mansfield* nonsuited the plaintiffs, observing, that he had known it several times ruled in Chancery (*h*), that, where the consignee becomes a bankrupt, and no part of the price has been paid, it was lawful for the consignor to seize the goods before they came to the hands of the consignee; and that this was decided, not

(*f*) Selw. N. P. 1275, (8th Ed.); 4 Bing. 519.

(*g*) *Coram* Lord *Mansfield*, C. J., 32 Geo. II., cited 1 H. Bl. 366 n. See *per* Lord *Loughborough*, *Mason* v. *Lickbarrow*, 1 H. Bl. 366.

(*h*) See *Snee* v. *Prescott*, *cor.* Lord *Hardwicke*, Ch., 1 Atk. 248; *D'Aguila* v. *Lambert*, 2 Eden, 75; Ambl. 399.

upon principles of equity only, but the general laws of property (*i*).

The vendor's right of stopping the goods in transitu may be considered under the three following heads :—

I. Who is entitled to exercise the right of stopping goods *in transitu.*

II. Under what circumstances the vendor may stop the goods.

III. When the *transitus* is determined.

Who entitled to stop goods.

I. *Who is entitled to exercise the Right of stopping Goods in Transitu.*

Quasi vendor.

It is sufficient, to entitle a party to stop goods in transitu, that he stands in relation of vendor

(*i*) The effect of stopping the goods *in transitu*, where possession has been actually re-obtained, seems to be, entirely to rescind the contract, and to revest the property absolutely in the vendor: on this principle, it is decided that the vendee (or his assignee on his bankruptcy) no longer possesses an insurable interest in the goods; *Clay* v. *Harrison*, 5 Man. & Ry. 17; S. C. 10 B. & C. 99. But see 7 T. R. 445; 1 Campb. 109; 1 M. & Payne, 392; and in Mont. & Gregg, B. L. 458, note (*d*), it is said, that the vendor is only entitled to the purchase-money, and the bankrupt's assignees may claim the goods on payment of the price. If there is any distinction, it seems to depend on the question, whether the vendor had merely exercised the right of stoppage in transitu in law; or, whether he had performed any overt act of rescission (which he might do as long as the contract was *executory*), such as actually retaking possession. See the same case of *Clay* v. *Harrison*, reported in Lloyd & Welsby, Merc. Ca. 104, and *ib.* 113 n. And see Chit. Contracts, 342, (2d Ed.).

quoad the bankrupt; therefore, where the party receiving the order procured the goods from a third person on his own credit, and shipped them on the account of the bankrupt, drawing bills upon the latter for the price, it was held, that the shipper was in effect the seller, and was therefore justified in authorizing his agent to stop the goods (*k*). So, the agent, on whose credit the goods were sold, may, in order to protect himself, prevent them from vesting in the vendee-principal, by giving them a new direction, adverse to the principal and contrary to the course of dealing for which he as agent had ordered them (*l*). But a mere surety has not such power; therefore, where the party stopping the goods had no interest in the original purchase, but had agreed to accept bills drawn for the price upon receiving a commission on the amount, it was held, that he had no right, and that the assignees of the bankrupt were entitled to recover the proceeds (*m*).

But not mere surety.

An agent duly authorized may stop the goods on behalf of his principal. But it seems that, where the goods have been stopped by a third party in favour of the consignor, his authority for the particular act must have been received before obtaining possession of the goods: if there was no privity

Agent.

(*k*) *Feize* v. *Wray*, 3 East, 93; *Hawkes* v. *Dunn*, 1 Tyrwh. 413.

(*l*) See *per Bayley*, B., 1 Tyrwh. 418, 419.

(*m*) *Siffken* v. *Wray*, 6 East, 371; S. C. 2 Smith, Rep. 480.

at the time between him and the vendor-principal, a subsequent assent and approval will not make it a due exercise of the right (*n*).

Indorsee of bill of lading.

A party, to whom the vendor indorses the bill of lading for valuable consideration, subsequently to the original consignment, will have the same right of stopping the goods as the vendor himself; but an indorsee without consideration is not entitled to stop the goods (*o*).

II. *Under what circumstances the Vendor may stop the Goods.*

When the goods may be stopped.

The general rule is, that an unpaid vendor may always stop the goods, in the event of the insolvency of the consignee, at any time before they have reached the latter (*p*). The right of stopping in transitu is not founded merely on a rescission of the contract, but is an equitable lien adopted by the law for the purposes of substantial justice (*q*).

Part-payment does not preclude.

Therefore, part-payment for the goods does not preclude the vendor's right as to the residue, but only operates *pro tanto* (*r*). So, the right may be

(*n*) *Siffken* v. *Wray*, 6 East, 371. [The Court, however, did not give a positive opinion to this effect, because the agent's taking was not adverse, but under an agreement with the bankrupt.]

(*o*) *Waring* v. *Cox*, 1 Camp. 369; Abb. Ship. 227.

(*p*) See *Birkett* v. *Jenkins*, cited Cowp. 296.

(*q*) *Per* Lord *Kenyon*, C. J., 7 T. R. 445.

(*r*) *Hodgson* v. *Loy*, 7 T. R. 440; *Wiseman* v. *Vandeput*, 2 Vern. 204.

exercised, although the vendee had previously consigned goods to the vendor, for which no payment had been made; for the vendor is not bound to wait until a final adjustment of accounts between them, to ascertain the question to which party a balance may be due (*s*). But, if the goods had been consigned on the account of an existing debt, the consignee's insolvency would not have given the vendor any right of stoppage (*t*). Where the vendor has once voluntarily agreed to waive his right of stopping the goods, he cannot afterwards insist upon it (*u*).

Assignment by consignee of bill of lading.

It seems that it may be collected from the decisions, that no act on the part of the purchaser, before obtaining either actual or constructive possession of the goods, can preclude the vendor's exercise of his right, except the indorsement for a valuable consideration, to an assignee, without notice, of a bill of lading (*x*). Such negotiation of

(*s*) *Wood* v. *Jones*, 7 D. & R. 126. See *Kinloch* v. *Craig*, 3 T. R. 119, 783; 4 Bro. P. C. 47.

(*t*) *Vertue* v. *Jewell*, 4 Campb. 31; *Smith* v. *Bowles*, 5 Esp. 278. See *per Abbott*, C. J., 7 D. & R. 128, 129.

(*u*) *Nichols* v. *Hart*, 5 C. & P. 179.

(*x*) And, perhaps it may be added, of a West India Dock warrant. An indorsement in blank of such warrant by a consignee, or by a sub-vendee, was held, by *Dallas*, C. J. at *nisi prius*, to be sufficient to bar the vendor's right; *Keyser* v. *Suse*, Gow, 58. These warrants seem to have been generally considered negotiable instruments equally with bills of lading; *Spear* v. *Travers*,

the instrument is held to vest the property in the indorsee, and to bar the vendor's right (*y*); and the principle of the doctrine seems to be analogous to that, which protects the *bonâ fide* indorsee of a bill of exchange or promissory note from being affected by the private mutual claims of the drawer and drawee, or of the maker and payee. A bill of lading is a negotiable instrument (*z*), and to a certain extent analogous to a bill of exchange (*a*); therefore, for the security of purchasers, the indorsement for a valuable consideration by the consignee, or his authorized agent, is held to pass the property, discharged of the vendor's claim.

Indorsement necessary.

But a delivery of the bill of lading unindorsed does not bar the right of the consignor to stop the

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4 Campb. 251; *Zwinger* v. *Samuda*, 1 B. Moore, 12. (See TROVER BY VENDEE, Part 2, Chap. ii.) It has been decided that East India warrants are not negotiable instruments, at least within the meaning of the Factor's Act; *Taylor* v. *Kymer*, 3 B. & Ad. 337.—Post.

(*y*) *Mason* v. *Lickbarrow*, and *Lickbarrow* v. *Mason*, (in error,) reported or cited, in its several stages, in the following authorities; 4 Bro. P. C. 57; 2 T. R. 63; 5 T. R. 367, 683; 6 T. R. 131; 1 H. Bl. 357; 2 H. Bl. 211; 6 East, 20 n. It was so first decided in *K. B.*, which decision was reversed in *Cam. Scacc.*, but the reversal was reversed, and the original decision confirmed, in *Dom. Proc.* On a new trial the Court of King's Bench declared that they adhered to their former opinion; which has ever since been invariably adopted. See Long, 178; 1 H. Bl. 357 n. *Appleby* v. *Pollock*, cited Abb. Shipp. 385.

(*z*) *Vid. supra*, p. 123; and *post*. For the form of a bill of lading, see Appendix.

(*a*) See *per Ellenborough*, C. J., 4 East, 217.

goods (*b*). Nor is the right barred by the indorsement without valuable consideration, whether it has been indorsed by the consignor to the consignee (*c*), or by the consignee to a third party (*d*). On this principle, where the assignee of the bill of lading undertook, in consideration of the indorsement, to make advances to the original consignee, which he afterwards failed to do, but claimed to retain the instrument as a security for prior advances, it was held, that the consignor might stop the goods (*e*). So, where the assignee of the bill of lading has given only a partial consideration, and it appears on the face of the agreement entered into between him and the original consignee, that the consignor has never received payment for the goods, the right of the latter is not barred (*f*). So, the vendor's right is not barred if the indorsee had notice of the consignee's insolvency (*g*); or if he fraudulently procured the bill of lading to be signed before the goods were delivered on board (*h*). Yet, in order to defeat the vendor's right, it is not

Also valuable consideration.

And absence of notice.

(*b*) *Nix* v. *Olive*, Abb. Shipp. 393, 394, (5th Ed.)

(*c*) *Tucker* v. *Humphery*, 4 Bingh. 522; S. C. 1 M. & Payne, 378. See *per Grose*, J., *Walley* v. *Montgomery*, 3 East, 591; *Patten* v. *Thompson*, 5 M. & S. 350.

(*d*) See *per Buller*, J., 2 T. R. 681; *per* Lord *Ellenborough*, C. J., 6 East, 41.

(*e*) *Newsom* v. *Thornton*, 6 East, 17.

(*f*) *Salomons* v. *Nissen*, 2 T. R. 674.

(*g*) *Vertue* v. *Jewell*, 4 Campb. 32.

(*h*) *Osey* v. *Gardner*, Holt, N. P. C. 405.

necessary, that the assignee of the bill of lading should have taken the assignment without notice that the goods had not been paid for; but it is sufficient if he has taken it "without notice of such circumstances as rendered the bill of lading not fairly and honestly assignable" (*i*). Therefore, although the assignee of the bill of lading was aware that the consignor had not actually received payment, the fact being that the latter had taken acceptances from the consignee payable at a future day not arrived at the time of the assignment, and no collusion between the parties being proved, such knowledge was held not to prevent the assignment from passing the property in the goods (*k*).

Effect of giving partial consideration.

An indorsement of the bill of lading, in consideration of partial advances, gives the *bonâ fide* assignee a claim *pro tanto;* but not beyond (*l*). In a recent case, very elaborately argued in K. B., the nature of the consignor's right, after such claim of the assignee has been satisfied, was fully considered (*m*). From this case it may be collected that, where the consignee, before his insolvency and before the goods had arrived, has indorsed the bill of lading to a third party as a security for advances, the equitable right of the unpaid vendor

(*i*) See 9 East, 516; 2 T. R. 681.

(*k*) *Cumming* v. *Brown*, 9 East, 506.

(*l*) *Cumming* v. *Brown*, 1 Campb. 108; S. C. 9 East, 506.

(*m*) *Westzynthus*, in re, 5 B. & Ad. 817; S. C. 2 Nev. & Man. 644.

to stop the goods, (although he has no strictly legal right to resume possession even after the claim is satisfied,) continues, subject only to the amount of such claim: and, if the indorsee holds in his hands any other property belonging to the insolvent, the unpaid vendor has an equity to compel him to resort to it in the first instance.

It appears, therefore, upon the whole view of the cases, that the indorsee of the bill of lading for valuable consideration, without notice of circumstances that render the instrument not fairly and honestly assignable, has a claim upon the goods proportioned to the amount of his advances, paramount to the vendor's right of stoppage.

Right not affected by claims not derived from bill of lading.

But the vendor's right is not affected by the claims of third parties against the consignee, if derived from any other source than the bill of lading. Thus, if the purchaser, before receiving the goods, enters into a contract for the resale, and receives the price, and afterwards becomes insolvent, the vendor may stop the goods as against the sub-vendee(*n*). Yet, if the purchaser, at the time of the resale by him, had made a *primâ facie* payment for the goods, as by giving his acceptance to the vendor, this will so far complete his title as to make good the subsequent resale for valuable

(*n*) *Craven* v. *Ryder*, 6 Taunt. 433; S. C. 2 Marsh. 127; Holt, N. P. C. 100.

consideration, and to bar the vendor from recovering against the sub-vendee, although the original purchaser should subsequently become bankrupt, and the acceptance be dishonoured(*o*). Again, it has been decided that, where the consignee, before the arrival of the goods, gives a delivery note, or other instrument not negotiable, in favour of a third party, this does not prevent the consignor from stopping the goods(*p*). So, his right is not affected by an attachment against the goods, while in their transit, at the suit of a creditor of the consignee(*q*); nor, by the lien of a carrier (or other bailee) on a general balance of account between the consignee and the latter(*r*). Nor can the consignee's agent set up any claim, which he may have against his principal, as a ground to bar the vendor's right of stoppage; especially where the vendor and purchaser both act in the same interest, and are both desirous of stopping the goods(*s*). Tindal, C. J., said; "Questions on this

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(*o*) *Davies* v. *Reynolds*, 4 Campb. 267; S. C. 1 Stark. N. P. C. 115.

(*p*) *Akerman* v. *Humphery*, 1 C. & P. 53, (recognised 4 Bingh. 522).

(*q*) *Smith* v. *Goss*, 1 Campb. 282. See *Bartram* v. *Farebrother*, 1 M. & Payne, 515.

(*r*) *Oppenheim* v. *Russell*, 3 B. & P. 42; *Richardson* v. *Goss*, 3 B. & P. 119; *Morley* v. *Hay*, 3 Man. & Ry. 396; *Hawley* v. *Day*, Dan. & Lloyd, Merc. Ca. 51, n.

(*s*) *Nicholls* v. *Le Feuvre*, 2 Bingh. N. S. 81; *Patten* v. *Thompson*, 5 M. & S. 350.

branch of law usually arise upon conflicting claims between the vendor and the purchaser, or the purchaser's representatives. But, where the purchaser (the defendant's principal) has renounced his claim to forward the goods to their destination, what right can the agent set up to retain them?"(*t*)

III. *When the Transitus is determined.*

When the transit is determined.

In reference to the determination of the *transitus*, the principal consideration is, what amounts to an actual or constructive delivery to the purchaser. The general rule (subject however to the qualifications hereafter adverted to) is, that the transitus continues until the goods have reached their original destination, unless the purchaser have in the meantime given them a new direction(*u*).

1. *By actual Delivery.*

By actual delivery.

If the goods come into the actual possession of the consignee, though it be wrongfully, as by the production of an unindorsed bill of lading, although the party having the custody of the goods may be liable over to the vendor, the right of the latter as against the consignee is gone(*x*). However, if the vendor, on the insolvency of the consignee, has given notice to the master of the ship (or other

(*t*) 2 Bingh. N. S. 86.
(*u*) *Morley* v. *Hay*, 3 Man. & Ry. 396.
(*x*) *Coxe* v. *Harden*, 4 East, 211; S. C. 1 Smith, Rep. 20.

bailee who holds the goods), not to deliver the cargo, this will be sufficient without actually obtaining possession(*y*). Thus, where the bailee, after acquiescing in such notice, delivers them over to the bankrupt or his assignees, whether wilfully(*z*), or by mistake(*a*), the delivery will not preclude the vendor from exercising his right. So, the vendor's right was held not to be barred, where the bailee, having been requested by the vendor to sign a receipt to the effect that he held the goods on the account of the latter, kept the receipt but refused to sign it, and immediately afterwards signed bills of lading to the order of the vendee(*b*). And it was held in an old case, that an entry of the goods by the vendor at the custom-house, in order to pay the customs for them, was a sufficient exercise of the right, although the assignees afterwards forcibly obtained possession of them(*c*).

(*y*) *Northey* v. *Field*, 2 Esp. 613; *Patten* v. *Thompson*, 5 M. & S. 350; *Inglis* v. *Usherwood*, 1 East, 515. This distinction has been taken;—a *claim* on the part of the *vendor* is a sufficient exercise of the right; but actual or constructive *possession* on the part of the *vendee* is necessary, in order to bar the right; See Mont. & Gregg. B. L. 455, note (*a*), (3rd Ed.).

(*z*) *Bohtlingk* v. *Inglis*, 3 East, 381; *Mills* v. *Ball*, 2 B. & P. 457.

(*a*) *Litt* v. *Cowley*, 7 Taunt. 169; S. C. Holt, N. P. C. 338.

(*b*) *Ruck* v. *Hatfield*, 5 B. & A. 362. See *Craven* v. *Ryder*, Holt, N. P. C. 100.

(*c*) Ex parte *Walker* and *Woodridge*, cited Co. B. L. 419.

But not if the contract is rescinded before completion.

Even after the arrival of the goods at the premises of the vendee, the right of stoppage will not be determined, if the vendee, at any time before circumstances have taken place to vest the property absolutely in himself, rescind the contract and refuse to accept the goods; as where, either before (*d*) or *immediately* after (*e*) the receipt of the goods, the consignee sent notice to the consignor that he was in embarrassed circumstances, and should therefore decline accepting the consignment. But if the property has already vested, the right is absolutely gone (*f*); for although a trader, even when in an insolvent state, is justified in *rescinding a contract* before the property has vested, and declining to accept the goods, yet the policy of the bankrupt-laws will not suffer him to *divest the property* after it has once vested, and re-transfer the goods. And the vendee must elect to rescind the contract immediately (if at all) on the arrival of the goods, otherwise it will be presumed that he has accepted them (*g*). The vendor's right of stopping, or rather recovering, the goods under

(*d*) *Richardson* v. *Goss*, 3 B. & P. 119. See *Bartram* v. *Farebrother*, Dan. & Lloyd, Merc. Ca. 42; S. C. 1 M. & Payne, 515; 4 Bingh. 579.

(*e*) *Salte* v. *Field*, 5 T. R. 211; *Atkin* v. *Barwick*, 1 Stra. 165.

(*f*) *Barnes* v. *Freeland*, 6 T. R. 80; *Smith* v. *Field*, 5 T. R. 402. After the property has vested, such act on the part of the vendee would amount to a fraudulent preference; See above, pp. 111, 112.

(*g*) *Neate* v. *Ball*, 2 East, 117; *Livesay* v. *Hood*, 2 Campb. 83.

these peculiar circumstances, seems to be more properly a *revival*, than a continuance, of the original right; for it can scarcely be said that a *transitus* continues, after the goods have actually *arrived;* and moreover, in order to give this power to the vendor, it clearly requires the concurrence of the vendee, which is not necessary in other cases: accordingly, the rescission of the contract on the part of the vendee must necessarily have taken place *before* his bankruptcy.

It was formerly held, that the transitus could not be determined until the goods had arrived at their original destination, even if the vendee had previously obtained actual possession of them (*h*). But, although it is the general rule that the right continues until the arrival at the original destination, so that the vendor may stop the goods in the hands of an intermediate party (*i*); yet, where the vendee by his own act anticipates the arrival of the goods, and exercises any act of ownership, the *transitus* will be determined as effectually as if the consignment had reached its original destination (*k*).

Even if the arrival is anticipated.

2. *By Constructive Delivery.*

By constructive delivery.

A constructive delivery of the goods to the con-

(*h*) *Holst* v. *Pownal*, 1 Esp. 240; *per* Lord *Kenyon*, C. J.

(*i*) *Coates* v. *Railton*, 6 B. & C. 422; *Morley* v. *Hay*, 3 Man. & Ry. 396.

(*k*) *Foster* v. *Frampton*, 6 B. & C. 107. See 2 B. & P. 461.

signee will determine the transit, and bar the vendor's right. It was once held that there must be an actual delivery into the hands of the vendee in order to constitute such a perfect change of possession as to preclude the vendor's right of stopping the goods; or, as Lord Mansfield expressed it, the goods must come to the *corporal touch* of the vendee(*l*). But it is now clearly decided, that the goods need not be taken by the consignee himself(*m*). Lord Ellenborough observed (*n*), "that the expression, '*corporal touch*' of the vendee, is a figurative expression, rarely, if ever, strictly true. If it be predicated of the vendee's own actual touch, or of the touch of any other person, it comes in each instance to be a question, whether the party, to whose touch it actually comes, be an agent so far representing the principal, as to make the delivery to him a full, effectual, and final delivery to the principal, as contradistinguished from a delivery to a person virtually acting as a carrier or mean of conveyance to or on account of the principal in a mere course of transit towards him."

Delivery to third party as *agent*.

Accordingly, where the vendee's appointed agent had received orders from his principal to give the goods a new direction on their arrival, the transitus was held to be at an end as soon as the goods had

(*l*) *Hunter* v. *Beal*, cited 3 T. R. 466, 5 East, 184.
(*m*) See *Ellis* v. *Hunt*, 3 T. R. 464.
(*n*) 5 East, 184.

reached the possession of the agent (*o*). However, even where the original destination of the goods has been changed, and a new direction given to them, by the act of a third party, it may sometimes be a doubtful question, whether such change is to be deemed to have been made on the behalf of the vendor or of the purchaser (*p*). And the purchaser's agent, receiving the goods, cannot bar the vendor's right without the assent and authority of his principal (*q*).

Delivery to third party as *middleman*.

But, although delivery to the vendee's appointed agent has the same effect as a delivering to the principal himself, yet a delivery to a third party, though made especially on the account of the consignee, will not amount to such a delivery to the latter as to determine the transitus, unless the third party acted as the *special and exclusive* agent of the consignee. Thus, where the goods were delivered to defendant to be forwarded to the consignees, and the defendant retained them for debts due to himself from the consignees, it was held that the vendor was entitled to stop them in the hands

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(*o*) *Dixon* v. *Baldwin*, 5 East, 175; *Hawkes* v. *Dunn*, 1 Cr. & Jer. 519; S. C. 1 Tyrwh. 413. See *per Bayley*, J., *Allan* v. *Gripper*, 2 Cr. & Jer. 221.

(*p*) See *Nicholls* v. *Le Feuvre*, 2 Bingh. N. S. 87. In such cases it seems to be a question for the jury to decide, on the behalf of which party the change of direction was made: *Vid. ib. per Tindal*, C. J.

(*q*) *Nicholls* v. *Le Feuvre*, 2 Bingh. N. S. 81.

of the defendant, and to recover them in trover (*r*). So, where they are delivered to any party who may be considered a *middle-man* between the vendor and vendee, as a packer (*s*), or a commission-agent (*t*); or, where they are delivered, according to vendee's directions, to a wharfinger (*u*); or, where they have been sent to some third party for a specific purpose (*x*); the transitus is not determined. So, where, upon the arrival of the goods at the warehouse of a wharfinger, for the vendee, the latter declines receiving them, and the vendor's agent accordingly stops them in the bailee's hands (*y*). Nor is the transitus determined by the arrival, at a wharf, of the vessel in which the goods are shipped, and sending the invoice to the consignee (*z*). Nor where the goods have been shipped by a particular vessel, on the account of the consignee, whether the vessel was chartered by the latter or not (*a*). If, however, the con-

(*r*) *Stokes* v. *La Riviere*, cited 3 T. R. 466; 3 East, 397.

(*s*) *Hunt* v. *Ward*, cited 3 T. R. 467.

(*t*) *Coates* v. *Railton*, 6 B. & C. 422.

(*u*) *Smith* v. *Goss*, 1 Campb. 282; *Mills* v. *Ball*, 2 B. & P. 457; *Morison* v. *Gray*, 9 B. Moore, 484; S. C. 2 Bingh. 260.

(*x*) *Owenson* v. *Morse*, 7 T. R. 64.

(*y*) *Bertram* v. *Farebrother*, 4 Bingh. 579; S. C. 1 M. & Payne, 515; Dan. & Lloyd, Merc. Ca. 42.

(*z*) *Tucker* v. *Humphrey*, 4 Bingh. 516; S. C. 1 M. & Payne, 378.

(*a*) *Bohtlingk* v. *Inglis*, 3 East, 381, (overruling *Boehtlinck* v. *Schneider*, 3 Esp. 59). "This case is perfectly consistent with the case of *Inglis* v. *Usherwood*, 1 East, 515;" *per Lawrence*, J.,

signees were to have the entire control over the ship, or if the goods were in effect shipped, not as from the vendor to the vendees, but as upon a mercantile adventure by the consignees themselves, the transitus is at an end by the delivery on board the vessel (*b*).

Symbolical delivery.

The transitus is determined if there has been such a symbolical transfer to the consignee, or to the assignees on his bankruptcy, as the nature of the particular case will admit. Thus, the transitus was held to be determined, and the consignor's right gone, where the assignee of the bankrupt put his mark upon the goods, which were lying at the time at an inn, and could not be removed, as they were *in custodiâ legis*, having been attached at the suit of a creditor of the bankrupt (*c*). So, where the goods are lying in a warehouse, and are transferred in the wharfinger's books into the vendee's name (*d*); or (as it seems), where the delivery-order is merely lodged with the wharfinger, without any transfer in his books (*e*); or, where the vendee, after the delivery-order has been given,

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3 East, 398. See *Thompson* v. *Trail*, 2 C. & P. 335, *per Abbott*, C. J. And see *Verrulez* v. *Tulloh*, (decided in 1789 in a Court of Amsterdam,) cited with approbation by Lord *Loughborough* in *Lickbarrow* v. *Mason*, 1 H. Bl. 364.

(*b*) *Fowler* v. *M'Taggart*, cited 7 T. R. 422; 1 East, 522; 3 East, 388. See *per Lawrence*, J., 3 East, 396, 397.

(*c*) *Ellis* v. *Hunt*, 3 T. R. 464.

(*d*) *Harman* (Assignee of *Dudley*) v. *Anderson*, 2 Campb. 243; *Hawes* v. *Watson*, 2 B. & C. 540; S. C. 4 D. & R. 22.

(*e*) 2 Campb. 245.

has the goods weighed, and takes away part (*f*). So, where part of the goods are delivered to the vendee, or his agent, in the name of the whole (*g*); but, if the part delivered is intended to be separated from the residue of the bulk, it will not constitute an entire delivery (*h*). However, where a part-delivery has taken place, the presumption is that it was intended as a delivery of the whole; therefore, the *onus* of proof is upon the party seeking to show that, under the circumstances, the right of stoppage continues (*i*).

Act of ownership by vendee.

Again, although (as it has been stated (*k*)) the mere delivery to a bailee or middle-man (not being the vendee's exclusive agent), is not sufficient to determine the transitus, yet, if the vendee, while the goods are at the warehouse of a wharfinger or other middle-man, has exercised some act of ownership (*l*), the property vests in him and the transitus is determined. Thus, the vendor's right is barred, where the goods are delivered at a wharf, and the vendee has them shipped and the receipt made out in his own name (*m*); or, where they are

Using the *goods* as his own.

(*f*) *Hammond* (Assignee of *Gadsden*) v. *Anderson*, 1 N. R. 69.

(*g*) *Slubey* v. *Hayward*, 2 H. Bl. 504; *Hammond* v. *Anderson*, 1 N. R. 69; *Gwynne*, ex parte, 12 Ves. Jun. 379.

(*h*) *Miles* v. *Gorton*, 2 Cr. & Mees. 504; *Bunney* v. *Poyntz*, 4 B. & Ad. 568.—Post.

(*i*) *Betts* v. *Gibbins*, 4 Nev. & Man. 76, see *per Taunton*, J.

(*k*) *Supra*, pp. 204, 205.

(*l*) *Wright* v. *Lawes*, 4 Esp. 82.

(*m*) *Noble* v. *Adams*, 7 Taunt. 59; S. C. 2 Marsh. 366; Holt, N. P. C. 248.

lodged in the warehouse of a dock company, and the vendee sells them and receives the price, transferring the delivery-order to the sub-vendee(*n*); or, where they are delivered to a packer, and the vendee's agent has part unpacked, and the remainder repacked(*o*); or, where they are delivered to a warehouseman, to whom the vendee pays rent(*p*). On the same principle, the transitus is determined, where the goods remain on the vendor's premises after the day when they ought to have been removed, and warehouse-rent is charged to the vendee(*q*); or, where the goods, while remaining at the vendor's wharf, are resold with the consent of the vendor, and marked by the vendee and the sub-vendee(*r*). On a similar principle, the transitus is considered to be determined, where the goods remain in a warehouse, and there are circumstances from which it may be presumed that the vendee considered the warehouse his own;—as, where the goods are deposited in the warehouse of a carrier for the convenience of the vendee(*s*);

Using the warehouse as his own.

(*n*) *Barton* v. *Boddington*, 1 C. & P. 207.

(*o*) *Leeds* v. *Wright*, 3 B. & P. 320; S. C. 4 Esp. 243.

(*p*) *Wright* v. *Lawes*, 4 Esp. 82.

(*q*) *Hurry* v. *Mangles*, 1 Campb. 452.

(*r*) *Stoveld* v. *Hughes*, 14 East, 308. See *Hawes* v. *Watson*, 2 B. & C. 540: *per Bayley*, J., ib. 543. See 14 East, 312, *per* Lord *Ellenborough*, C. J.

(*s*) *Allan* v. *Gripper*, 2 Cr. & Jer. 218; S. C. 2 Tyrwh. 217; *Foster* v. *Frampton*, 6 B. & C. 107; S. C. 9 D. & R. 108. The question is, whether the warehouse was considered the final place of destination (2 Cr. & Jer. 221, 222); for the transitus is not

or, where the vendee has been accustomed to use the warehouse as his own(*t*); or, where he has no warehouse of his own, and no other convenient place wherein to stow the goods(*u*).

Constructive delivery insufficient when anything remains to be done.

As long as anything remains to be done to the goods before the vendee is entitled to the possession, there cannot be such a constructive delivery as to bar the vendor's right of stoppage. Thus, the transitus was held not to be determined, where the quantity of the goods had to be ascertained by measuring or weighing(*x*); or, where the goods have been delivered at a warehouse which the vendee considers his own, but the terms of the contract of sale were ready-money payment(*y*); or, where the vendee continues yet liable to pay the freight and other expenses, provided that no act has been done by the carrier implying an assent to part with the possession before receiving such expenses(*z*).

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at an end if there was an ulterior place of delivery in view; (See *Coates* v. *Railton*, 6 B. & C. 426, *per Bayley*, J. See 5 East, 175).

(*t*) *Tucker* v. *Humphery*, 1 M. & Payne, 392; *Rowe* v. *Pickford*, 1 B. Moore, 526; S. C. 8 Taunt. 83. *Per Chambre*, J., *Richardson* v. *Goss*, 3 B. & P. 127.

(*u*) *Scott* v. *Pettitt*, 3 B. & P. 469.

(*x*) *Busk* v. *Davis*, 2 M. & S. 397; S. C. 5 Taunt. 622, n.; 1 Marsh. 258, n.; *Withers* v. *Lys*, Holt, N. P. C. 18. See 1 C. & P. 210. See TROVER BY VENDEE, Part 2, Chap. ii.

(*y*) *Loeschman* v. *Williams*, 4 Campb. 181.

(*z*) *Crawshay* v. *Eades*, 1 B. & C. 181.

CHAP. III.

ASSUMPSIT BY VENDOR.

Assumpsit by vendor.

If the purchaser makes default in the performance of the contract, the vendor may maintain an action of Assumpsit. The action may be, either on the special contract for not accepting,—or, where the property has vested in the purchaser, for goods bargained and sold,—or, where actual or constructive delivery has taken place, for goods sold and delivered (*a*).

When several counts not allowed.

By the New Rules of pleading (*b*) it is provided, that "several counts shall not be allowed, unless "a distinct subject-matter of complaint is intend-"ed to be established in respect of each." Thus, "counts, for not accepting and paying for goods "sold, and for the price of the same goods as "goods bargained and sold, are not to be allowed."

Count on account stated.

But the plaintiff may add a count on an account stated (*c*); and this is in general advisable in actions

(*a*) See Forms of these counts in the Appendix.

(*b*) Rules Pl. Hil. T. 4 Will. IV. § 5.

(*c*) "Provided, that a count for money due on an account "stated may be joined with any other count for a money demand, "though it may not be intended to establish a distinct subject-"matter of complaint in respect of each of such counts." Rules, Hil. T. 4 Will. IV.

for the recovery of money demands (*d*). Thus, if a precise sum has been admitted to be due, the plaintiff may recover on this count, although there may have been a written memorandum of the original agreement (*e*); or, although the items of account were secured by specialty (*f*). But the acknowledgement must have been unqualified and absolute (*g*). The admission of a certain sum due for the sale of standing trees, made after the trees were felled and carried away, supports this count (*h*). And, where defendant agreed to take fixtures at a valuation made by two brokers, this count was held to be maintainable after such valuation had been made (*i*). Account stated.

The defendant will not be at liberty to go into evidence of the items of the account, and to show that the plaintiff cannot maintain an action on some on the ground of the illegality of the sale (*k*). The plaintiff ought to give evidence of something Evidence on account stated.

(*d*) 1 Chit. Pl. 308.

(*e*) *Teal* v. *Auty*, 2 B. & B. 99; *Singleton* v. *Barrett*, 2 Cr. & Jer. 368; *Seago* v. *Deanes*, 4 Bingh. 459.

(*f*) *Moravia* v. *Levy*, 2 T. R. 483, n. See *Foster* v. *Allanson*, 2 T. R. 479.

(*g*) *Evans* v. *Verity*, 1 Ry. & M. 239; *Wayman* v. *Hilliard*, 7 Bingh. 101.

(*h*) *Knowles* v. *Michel*, 13 East, 249. See *Pinchon* v. *Chilcott*, 3 C. & P. 236.

(*i*) *Salmon* v. *Watson*, 4 B. Moore, 73. See *Keen* v. *Batshore*, 1 Esp. 194.

(*k*) *Dawson* v. *Remnant*, 6 Esp. 24; *Owens* v. *Denton*, 1 Cr. Mees. & Rosc. 711.

Account stated.

more definite than a mere acknowledgement that something was due: if no evidence is given of the amount of the balance, he will be entitled to recover nominal damages only (*l*). He is not compelled to prove all the items of which the alleged account consists (*m*); and proof of the acknowledgement of a single item will support the count (*n*).

ASSUMPSIT ON SPECIAL CONTRACT FOR NOT ACCEPTING GOODS.

Assumpsit for not accepting.

THE vendor, in a special action against the purchaser for not accepting goods, must prove the contract of sale,—the performance on his part of conditions precedent,—and the damages which he has sustained by the defendant's default (*a*).

I. PROOF OF THE CONTRACT.

In proving the contract, the plaintiff must give evidence of the assent of the parties, and of the terms of the agreement.

1. *Assent of the Parties.*

The plaintiff must show that the contract was

(*l*) *Dixon* v. *Deveridge*, 2 C. & P. 109. But see *Bernasconi* v. *Anderson*, M. & Malk. 183; *Kirton* v. *Wood*, 1 M. & Rob. 253; in which it was ruled that, without proof of the amount, the plaintiff is not entitled even to nominal damages.

(*m*) *Bartlett* v. *Emery*, 1 T. R. 42, n.

(*n*) *Highmore* v. *Primrose*, 5 M. & S. 65.

(*a*) See 2 Phil. Ev. p. 83 (7th Ed.).

fully completed by the assent of both parties. The defendant will not be bound by a mere proposal on his part unaccepted at the time by the plaintiff; thus, where one offers to sell certain corn to another, the latter must show that he accepted the terms of the contract (*b*). So, where defendant offered to guarantee payment by J. S., the plaintiff must prove that he notified his acceptance of such guaranty, in order to make the defendant liable on his undertaking (*c*). The general rule is, that as long as the engagement is on one side only, it is not binding; for it is then *nudum pactum*, and there is no consideration to support the promise (*d*). On this principle, a bidder at an auction may retract his bidding at any time before the fall of the hammer (*e*). Again, the plaintiff must prove the conclusive assent of the defendant, as well as his own. Thus, where in a proposed contract of sale between the parties, the party to whom the offer was made agreed to give a definitive answer in six weeks, it was held that the party making the offer might retract it at any time

Assent of the parties.

Assent of plaintiff.

Assent of defendant.

(*b*) *Brable* v. *Holywell*, Cro. Eliz. 250. As to sufficient proof of notice of, and implied assent to, the terms or conditions of sale, see *Bywater* v. *Richardson*, 1 Ad. & Ell, 508; *Mesnard* v. *Aldridge*, 3 Esp. 271. Supra, p. 154.

(*c*) *Mozler* v. *Tinkler*, 1 Cr. Mees. & R. 692. See below, Part 3, Chap. ii.

(*d*) 3 T. R. 654; Plowd. Com. 5; Co. Litt. 35, b.

(*e*) *Payne* v. *Cave*, 3 T. R. 148; see *Weeks* v. *Tybold*, Noy, 11; Rol. Abr. *Action sur Case* (M), pl. 1.

Assent of the parties.

during that period (*f*). And, where the defendant offered to sell goods, and at the request of the plaintiff agreed to allow a certain period for deliberation, he was held not to be bound, although the other accepted the offer within the time specified (*g*); because the *locus penitentiæ* if allowed to either must be allowed to both. But where the vendor offered by letter, "to sell goods, receiving an answer by return of post," it was held that he was bound by the acceptance of the other party; even where the letter offering the terms had been accidentally delayed for two days, and the goods had been otherwise disposed of in the interim (*h*); for it was observed that, in such a case the defendant "must be considered as making in law, during every instant of time that the letter was travelling, the same identical offer to the plaintiff" (*i*). Where there is an option given to both parties to renounce the contract by a certain day, both are bound unless there is some act of disaffirmance before the expiration of the period (*k*). After the contract has been completed by conclusive

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(*f*) *Routledge* v. *Grant*, 4 Bingh. 653; S. C. 1 M. & Payne, 717; *Ellis* v. *Mortimer*, 1 N. R. 257.

(*g*) *Cooke* v. *Oxley*, 3 T. R. 653; *Head* v. *Diggon*, 3 Man. & Ryl. 97.

(*h*) *Adams* v. *Lindsell*, 1 B. & A. 681; *Kennedy* v. *Lee*, 3 Meriv. 441.

(*i*) *Per Curiam*, 1 B. & A. 683.

(*k*) *Humphries* v. *Carvalho*, 16 East, 45.

assent on both sides, it may be rescinded, by the consent of the parties, at any time, provided that the rights of third persons have not intervened (*l*), and if the vendor has offered to rescind the contract, and the purchaser assents, it cannot be taken into consideration whether the proposal was made in ignorance of his legal rights (*m*). Assent of the parties.

If the authorized Agent of the purchaser has assented to the terms of the contract, this will be equivalent to the assent of the principal himself (*n*); as, where the auctioneer writes the initials of the name of the purchaser's agent opposite to the lots bid for, in the catalogue (*o*). So, where the broker of the parties makes an entry in his books of the terms of the contract (*p*), or sends bought and sold notes to the vendor and purchaser (*q*), both parties are bound. But if there is a material difference between the bought and sold notes (*r*), or if a material alteration has been made by the broker in the sale note, without the Assent by agent.

(*l*) See *Salte* v. *Field*, 5 T. R. 211; *Smith* v. *Field*, 5 T. R. 402; And see infra, of rescission of the contract.

(*m*) *Gomery* v. *Bond*, 3 M. & S. 378.

(*n*) *Honeywood* v. *Geary*, 6 Esp. 119; *Runquist* v. *Ditchell*, 3 Esp. 64; *Heys* v. *Heseltine*, 2 Campb. 604.

(*o*) *Phillimore* v. *Barry*, 1 Campb. 513; *Kenworthy* v. *Schofield*, 2 B. & C. 945.

(*p*) *Heyman* v. *Neale*, 2 Campb. 337.

(*q*) *Goom* v. *Aflalo*, 6 B. & C. 117; *Hawes* v. *Forster*, 1 M. & Rob. 368. Supra, p. 77.

(*r*) *Cumming* v. *Roebuck*, Holt, N. P. C. 172. Supra, p. 76, note (*b*).

Assent of the parties.

purchaser's consent (*s*), he is not bound: otherwise, where there is a mere inaccuracy which has not prejudiced either party (*t*). So, where the vendee's broker communicates to his principal a contract differing in its terms from that which was really entered into, and the principal adopts the transaction as represented by his broker, it seems that he will not be liable on the real contract (*u*).

Special authority.

Where the agent has a special authority as to the price or quality of the goods which he is commissioned to purchase, his contract will not bind the principal if he exceed such authority (*x*). However, if he has any power to exercise his own discretion, he will not be considered a special agent (*y*); thus, in an old case it was held that, where a factor had a general authority to buy one sort of commodity, he might bind his principal by buying another (*z*). A subsequent ratification of

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(*s*) *Powell* v. *Divett*, 15 East, 29.

(*t*) *Mitchell* v. *Lapage*, Holt, N. P. C. 253.

(*u*) *Per Parke*, J., *Horsfall* v. *Fauntleroy*, Lloyd & Welsby, Merc. Ca. 341. See the dictum of *Parke*, J., and the doubt thrown out by Ld. *Tenterden*, C. J., 10 B. & C. 759.

(*x*) *E. I. Company* v. *Hensley*, 1 Esp. 112; *Fenn* v. *Harrison*, 3 T. R. 757; *Daniell* v. *Adams*, 1 Ambl. 498; *Wiltshire* v. *Sims*, 1 Campb. 258; see *Bank of Bengal* v. *E. I. Company*, 2 Knapp, 245.

(*y*) *Hicks* v. *Hankin*, 4 Esp. 114; *Whitehead* v. *Tuckett*, 15 East, 400.

(*z*) *Petties* v. *Soame*, Goldsb. 139; S. C. 13 Vin. Abr. 6. This, at least, seems to be the substance of the decision. See Paley, Pr. & A. p. 207 (3rd Ed.).

the agent's authority will make his contract binding on the principal, as much as if he had given previous consent (*a*), on the principle of the maxim, "*omnis ratihabitio retrotrahitur, ac mandato priori æquiparatur*" (*b*); and in some cases a ratification may be implied (*c*). Assent of the parties.

2. *Proof of the Terms of the Contract.*

Verbal and written Agreement.—It has been already stated that, by the Statute of Frauds (*d*), when the goods are of the value of £10 or upwards, the contract must be in writing, signed by the party to be charged or his authorized agent; unless part of the goods sold have been actually accepted, or unless something has been given in earnest to bind the bargain, or in part payment (*e*). Proof of terms of contract.

Where the contract has been reduced to writing, the writing itself must be produced, since parol evidence is secondary in its nature to written evidence, and is excluded by it (*f*); thus, where a bill of sale of goods has been executed, the instru- Written agreement.

(*a*) *Soames* v. *Spencer*, 1 D. & R. 32; *M'Lean* v. *Dunn*, 4 Bingh. 722.

(*b*) See 1 B. & P. 323.

(*c*) See 8 B. & C. 448; 2 Man. & Ry. 564.

(*d*) 29 Car. II. c. 3, s. 17.

(*e*) See above, pp. 49, 50, *et seq.* Book I. Chap. iii. Part 1.

(*f*) *Brewer* v. *Palmer*, 3 Esp. 213; *Vincent* v. *Cole*, 1 M. & Malk. 257; *Damer* v. *Langton*, 1 C. & P. 168; *Bliedstyn* v. *Sedgwick*, Ca. temp. Hardw. 304; *Jones* v. *Hunter*, Dan. & Lloyd, Merc. Ca. 214.

Parol and written evidence.

ment is the only evidence of the contract(*g*). But a mere unsigned memorandum made, after a verbal contract, by an agent, for the purpose of assisting his recollection, will not exclude parol evidence(*h*); and it seems the plaintiff is not bound to produce a memorandum of the agreement not signed by the defendant(*i*). If the original contract was commenced under a written instrument, which is not available for the plaintiff, it appears doubtful whether parol evidence even of additional items is admissible(*k*).

Exempted from stamp.

A written agreement relating to the sale of goods, wares, and merchandise, may be given in evidence without a stamp, being expressly exempted by the Schedule of the Stamp Act(*l*) from the usual agreement-stamp. Thus, an agreement for the sale of an undivided moiety of a specific chattel is an agreement of sale within the Act, and therefore exempted(*m*). So, it has been decided, that an agreement for the payment in a particular

(*g*) *Lano* v. *Neale*, 2 Stark. N. P. C. 105; *Kain* v. *Old*, 2 B. & C. 627.

(*h*) *Dalison* v. *Stark*, 4 Esp. 163; *Hawkins* v. *Warr*, 3 B. & C. 698. See *Burton* v. *Plummer*, 2 Ad. & Ell. 341; *Stephens* v. *Pinney*, 2 B. Moore, 349.

(*i*) *Wilson* v. *Bowie*, 1 C. & P. 8. See 4 Esp. 164; 3 B. & C. 698; 2 B. Moore, 349.

(*k*) See *Vincent* v. *Cole*, 3 C. & P. 481; S. C. 1 M. & Malk. 257. But see *Read* v. *Barber*, Dan. & Lloyd, Merc. Ca. 286, n.

(*l*) 55 Geo. III. c. 184. (See 3 & 4 Will. IV. c. 55, s. 32.)

(*m*) *Marson* v. *Short*, 2 Bingh. N. S. 118.

manner(*n*), or at a future time(*o*), of the price of goods; an agreement relating to a guaranty of payment(*p*);—an agreement relating to a warranty of soundness of the chattel sold(*q*);—an undertaking by a broker to indemnify the purchaser in the event of loss upon a resale(*r*);—an agreement to substitute a different contract concerning the sale of goods(*s*);—come within the exemption of the act. An agreement relating to the sale of goods may be given in evidence without a stamp, although it contain collateral matter(*t*), unless such collateral matter itself requires a stamp, and is auxiliary to the contract of sale(*u*). Stamp.

Agreements for the sale of fixtures(*x*), or agreements for the sale of growing crops, &c., which give an interest in land(*y*), are not agreements relating When not exempted.

(*n*) *Venning* v. *Leckie*, 13 East, 7. See *Ingram* v. *Lea*, 2 Campb. 521.

(*o*) *Ellis* v. *Ellis*, Gow, 216.

(*p*) *Warrington* v. *Furbor*, 8 East, 242; *Watkins* v. *Vince*, 2 Stark. N. P. C. 368.

(*q*) *Skrine* v. *Elmore*, 2 Campb. 407; *Brown* v. *Frye*, cited *ibid.*

(*r*) *Curry* v. *Edensor*, 3 T. R. 524.

(*s*) *Whitworth* v. *Crockett*, 2 Stark. N. P. C. 431.

(*t*) *Heron* v. *Granger*, 5 Esp. 269; *Meering* v. *Duke*, 2 Man. & Ry. 121; *Tooke* v. *Meering*, Dan. & Lloyd, Merc. Ca. 35. See *Grey* v. *Smith*, 1 Campb. 387.

(*u*) *Corder* v. *Drakeford*, 3 Taunt. 382.

(*x*) *Wick* v. *Hodgson*, 12 B. Moore, 213. But an agreement to supply water by means of pipes was held to be exempted, *Middlesex Waterworks* v. *Suwerkropp*, M. & Malk. 408.

(*y*) *Waddington* v. *Bristow*, 2 B. & P. 452. *Vid. supra*, p. 54,

Stamp.

to the sale of goods, wares, and merchandise, and therefore require a stamp. It has been held, that a contract *in fieri* is not within the exemption, such as a contract for the making and putting up of certain machines not *in esse* at the time of the contract(*z*). But a contract, for the sale of oil not yet expressed from the seed, was held to be exempted(*a*); and also, a contract for "finishing certain marble chimney-pieces in a workmanlike manner"(*b*). Contracts, of which the *primary object* is not the sale of goods, are not within the exemption(*c*). Contracts under seal, though relating to the sale of goods, are inadmissible without a stamp(*d*), because by other provisions of the Act all specialties are liable to a stamp duty.

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and the cases there cited, distinguishing contracts on the 4th section of the Statute of Frauds, from contracts on the 17th section; the former require a stamp, the latter are exempted.

(*z*) *Buxton* v. *Bedall*, 3 East, 303, *cor. Grose*, J., and *Lawrence*, J.

(*a*) *Wilks* v. *Atkinson*, 6 Taunt. 11; S. C. 1 Marsh. 412.

(*b*) *Hughes* v. *Breeds*, 2 C. & P. 159, *cor. Abbott*, C. J. [This case is clearly irreconcileable with *Buxton* v. *Bedall*: and probably the latter would now be overruled, since the passing of Lord Tenterden's Act (9 Geo. IV. c. 14, s. 7). The case of *Towers* v. *Osborne*, (1 Str. 506,) was cited by the Court, as an authority to show that such a contract was not a contract relating to the sale of goods, wares, and merchandises; but that case, it has been seen, is no longer law; See above, Book I. Chap. iii. (p. 52.)]

(*c*) *Smith* v. *Cator*, 2 B. & A. 781; *Leigh* v. *Banner*, 1 Esp. 403.

(*d*) See *per Bayley*, J., *Clayton* v. *Burtenshaw*, 5 B. & C. 45; S. C. 7 D. & R. 800.

Parol evidence will not in general be admitted to contradict or vary (*e*), or to add to (*f*), the terms of the written contract; or even to explain it where there is no latent ambiguity (*g*). Thus, the verbal declarations of the auctioneer, at the time of the sale, are inadmissible to contradict the written particulars (*h*). So, where there is no stipulation in the written contract as to the time of delivery of the goods, the purchaser will not be permitted to show, that they were to be taken away immediately (*i*). And where a written agreement specifies a particular time, parol evidence is inadmissible to alter it; thus, it has been held, that a promissory note made payable on demand, or on a particular day, cannot be shown to be payable upon some other day (*k*), or upon a contingency (*l*). But a latent ambiguity may be ex-

Parol evidence cannot vary written.

(*e*) *Meres* v. *Ansell*, 3 Wils. 275; *Maxwell* v. *Sharp*, Say. 189; *Foster* v. *Jolly*, 5 Tyrwh. 239; *Pickering* v. *Dowson*, 4 Taunt. 779.

(*f*) *Preston* v. *Merceau*, 2 Bl. Rep. 1249; *Gardiner* v. *Gray*, 4 Campb. 144.

(*g*) *Hope* v. *Atkins*, 1 Price, 143; *Coker* v. *Guy*, 2 B. & P. 565.

(*h*) *Shelton* v. *Livius*, 2 Cr. & Jer. 411. See above, Book I. Chap. v. and the cases there cited, p. 153, note (*b*).

(*i*) *Greaves* v. *Ashlin*, 3 Campb. 426; *Halliley* v. *Nicholson*, 1 Price, 404; *Cooper* v. *Smith*, 15 East, 103.

(*k*) *Free* v. *Hawkins*, 7 Taunt. 278; *Woodbridge* v. *Spooner*, 3 B. & A. 233.

(*l*) *Rawson* v. *Walker*, 1 Stark. N. P. C. 361; *Mosely* v. *Handford*, 10 B. & C. 729; *Foster* v. *Jolly*, 1 Cr. Mees. & R. 703.

Parol evidence.

plained by parol; thus, it may be shown by extrinsic evidence, that a party, in whose name the contract was made, acted as agent merely, if the contrary does not appear on the face of the written agreement (*m*).

Written agreement may be discharged by parol.

It seems that a written agreement may be waived or discharged by parol before breach (*n*), at all events where the Statute of Frauds does not require it to be in writing. And there seems to be some doubt whether it may not be so discharged, even where it could not have been sued upon without being in writing; for the words of the statute are, not that every agreement shall be in writing, but that no action shall be maintained upon it unless it be in writing;—which consists very well with the discharging of the agreement by parol (*o*). It

(*m*) *Wilson* v. *Hart*, 7 Taunt. 295.

(*n*) *Gorman* v. *Salisbury*, 1 Vern. 240; *Lord Milton* v. *Edgworth*, 5 Bro. P. C. 313; *Edward* v. *Weekes*, 1 Mod. 262.

(*o*) See the judgment of Lord *Denman*, C. J., 5 B. & Ad. 66. In *Taylor* v. *Hilary*, (1 Cr. Mees. & Rosc. 741; S. C. 5 Tyrw. 373,) a subsequent executory agreement, substituted for a former undertaking to guarantee the payment of the price of certain goods, was held on demurrer to discharge the prior obligation. The second agreement was not in writing, and it does not appear on the face of the pleadings that the first agreement was in writing; though it should seem that it must have been written, as it would not have been otherwise available. The ground of the decision seems to be, that the second agreement did not require to be in writing, because it was an original undertaking (see *per Parke*, B., 5 Tyrw. 375), and that performance was not necessary to be averred, because the plea was not by way of accord and satisfaction, (see *per Parke*, B., 5 Tyrw. 376; 1 Cr. Mees. & Rosc. 743.)—Post.

has been determined, however, in the recent case of *Goss* v. *Lord Nugent*(*p*), that the written contract cannot be *varied* in its terms by a parol contract subsequently made, such, as to substitute an agreement different in effect; as, the waiver by the vendee of a condition precedent to be performed by the vendor. This case seems to throw some doubt upon the case of *Cuff* v. *Penn*(*q*), and similar cases(*r*), in which it was decided that the time of performance, specified in a written instrument, might be enlarged by a subsequent parol agreement, on the ground that this did not amount to a different contract, but was merely a continuation of the original contract. Parke, J. observed(*s*), "I never could understand the principle on which these cases proceeded, for the new contract, to deliver within the extended time, must then be proved partly by written and partly by oral evidence." Parol evidence.

Variance in Proof.—Where there has been a special contract of sale, the terms must be accurately set forth in the declaration, and must be proved in general as they are laid (*t*). And where Variance.

(*p*) 5 B. & Ad. 58.

(*q*) 1 M. & S. 21.

(*r*) *Warren* v. *Stagg, coram Buller*, J., cited *Littler* v. *Holland*, 3 T. R. 591; *Thresh* v. *Rake*, 1 Esp. 53.

(*s*) 5 B. & Ad. 64.

(*t*) Bull. N. P. 145; *Elbourn* v. *Upjohn*, 1 C. & P. 572. By payment of money into Court, the special agreement is admitted,

Variance.

a material averment is contrary to the fact, it will not be cured by being laid under a *videlicet* (*u*); though where a statement is made unnecessarily, a *videlicet* may sometimes have the effect of rendering unnecessary to be proved what the plaintiff would otherwise be compelled to prove (*x*).

When material.

The averment of an absolute promise is not supported by proof of an alternative or conditional promise (*y*), or the converse (*z*); nor the averment of a general undertaking by proof of a limited or qualified undertaking (*a*). Where the contract declared upon was, that the vendor should sell certain tallow to the plaintiff at four shillings per stone, and the contract proved was, that he should sell it at four shillings per stone, *and so much more as the plaintiff paid to any other person,* it was held to be a fatal variance (*b*). And where the plaintiff declared on a contract for the delivery of 40

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and proof thereof is dispensed with; *Guillod* v. *Nock*, 1 Esp. 347; *Bennet* v. *Francis*, 2 B. & P. 550; S. C. 4 Esp. 28; *Walker* v. *Rawson*, 1 M. & Rob. 250; see 1 Cr. Mees. & R. 210.

(*u*) *White* v. *Wilson*, 2 B. & P. 116; *Preston* v. *Butcher*, 1 Stark. N. P. C. 3; *Grimwood* v. *Barritt*, 6 T. R. 460.

(*x*) 2 Wm's. Saund. Rep. 291 c, note to *Dakin's* case; *Crispin* v. *Williamson*, 8 Taunt. 112.

(*y*) *Shipham* v. *Saunders*, 2 East, 4 n.; see *Roberts* v. *Peake*, 1 Burr. 323; *Layton* v. *Pearce*, 1 Dougl. 15; *Tate* v. *Wellings*, 3 T. R. 531; *Blyth* v. *Bampton*, 3 Bingh. 472.

(*z*) *Anon.* 1 Chit. Rep. 60, a.

(*a*) *Jones* v. *Cowley*, 4 B. & C. 445; S. C. 6 D. & R. 533; *Latham* v. *Rutley*, 2 B. & C. 20.

(*b*) *Churchill* v. *Wilkins*, 1 T. R. 447.

bags of wheat immediately and the remainder on the next market day, proof of a contract for the delivery of 40 or 50 bags, and the remainder on the next market day, was held to be a variance (*c*). The allegation of a contract to perform on request, is not supported by proof of a contract to perform on a particular day (*d*); nor is a contract, for removing goods within a reasonable time, supported by proof of a contract to remove in a month (*e*); nor can a contract to take on board 500 quarters of wheat be stated as a contract to take a full cargo (*f*). An agreement to deliver a cargo "at the then shipping price" at a particular place, is not supported by proof of an agreement to deliver at a reasonable price (*g*). Where the plaintiff declares on a separate or sub-divided contract, this will not be supported by proof of an entire bargain (*h*). An agreement to deliver goods to defendant, will not be supported by proof of an agreement to deliver them to some other person (*i*). A contract, for the sale of goods by plaintiff and his partner, cannot be declared upon

Variance.

(*c*) *Penny* v. *Porter*, 2 East, 2.

(*d*) *Bordenave* v. *Bartlett*, 5 East, 111, n.

(*e*) *Hore* v. *Milner*, Peake, 42, n., *cor.* Ld. *Kenyon*, C. J.

(*f*) *Harrison* v. *Wilson*, 2 Esp. 708.

(*g*) *Acebal* v. *Levy*, 4 M. & Scott, 217.

(*h*) *Symonds* v. *Carr*, 1 Campb. 361; see *Everett* v. *Tindall*, 5 Esp. 169; *Parish* v. *Burwood*, 5 Esp. 33.

(*i*) *Leery* v. *Goodson*, 4 T. R. 687; *Lopez* v. *De Tastet*, 1 B. & B. 538.

Variance. as a contract by plaintiff alone: if the partner be alive he ought to be joined; if he be dead, the fact of the plaintiff being the surviving partner should appear on the record (*k*).

So, where the *subject-matter* of the contract of sale is not stated according to the fact, it is a fatal variance; as, where the goods contracted for are alleged to have been good merchantable wheat, instead of good second sort of wheat (*l*); or, where it is alleged, that the goods were contracted to be delivered according to a peculiar measure, and the proof is, that they were to be delivered according to the standard measure (*m*). So it is a fatal variance if the plaintiff mis-state the consideration. "It is a well known rule in pleading that, in assumpsit, the plaintiff must set forth the whole of the consideration truly, which induces the defendant to make the promise for the breach of which the action is brought" (*n*). If the legal effect of

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(*k*) *Jell* v. *Douglas*, 4 B. & A. 374; *Ditchburn* v. *Spracklin*, 5 Esp. 31; *Webber* v. *Twil*, 2 Wms'. Saund. Rep. 121, note. But where *defendant* is a surviving partner, he need not be described as such; *Richards* v. *Heather*, 1 B. & A. 29.

(*l*) *Anon.* Ld. Raym. 735, and Bull. N. P. 145; see *Cook* v. *Munstone*, 1 N. R. 351; *Weaver* v. *Burrows*, Bull. N. P. 139; *Boyd* v. *Siffkin*, 2 Campb. 329; *Tucker* v. *Cracklin*, 2 Stark. N. P. C. 385. As to variance between "the bought and sold notes" in sales made through a broker, see above, p. 76.

(*m*) *Hockin* v. *Cooke*, 4 T. R. 314.

(*n*) *Per Tindal*, C. J., *Cross* v. *Bartlett*, 3 M. & Payne, 541. *Blyth* v. *Bampton*, 3 Bingh. 472; 1 Chitt. Pl. 262.

the undertaking has been mis-stated by the plaintiff, it is not the less a variance that such statement has represented the agreement advantageously for the defendant (*o*). Variance.

Where the averment may be wholly rejected as surplusage, it is unnecessary to prove it; thus, where the plaintiff, in an action on an express warranty, alleged that the vendor *knew* the goods to be unfit for sale, it was held, that the *scienter* was immaterial and need not be proved (*p*). But in an action for falsely warranting the annual returns of a business at a particular sum, it was held that the alleged amount must be proved as laid (*q*). Surplusage.

It is sufficient if the contract declared upon be in substance, and in its legal effect, the same as the contract proved (*r*). Thus, a contract for the delivery of *rough* gum Senegal was held sufficiently stated as a contract for the delivery of gum Senegal; it appearing in evidence, that all gum Senegal When variance not material.

(*o*) *Allan* v. *Kenning*, 2 Moo. & Scott, 768.

(*p*) *Williamson* v. *Allison*, 2 East, 446; see *Frith* v. *Gray*, 4 T. R. 561, n.; Say. Rep. 142.—Post.

(*q*) *Gilbert* v. *Stanislaus*, 3 Price, 54.

(*r*) *Thornton* v. *Jones*, 2 Marsh. 287; S. C. 6 Taunt. 581; *Ware* v. *Juda*, 2 C. & P. 351; *Seaman* v. *Price*, 1 C. & P. 56; *Welsh* v. *Fisher*, 2 B. Moore, 378; *Parker* v. *Palmer*, 4 B. & A. 387; *Irving* v. *M'Kenzie*, 1 B. & B. 523; *Sampson* v. *Burton*, 2 B. & B. 89; *Guthing* v. *Lynn*, 2 B. & Ad. 232. And many defects which would have been bad on special demurrer are cured by pleading over; see 1 Chit. Pl. p. 359.

Variance.

on its arrival in this country is called rough (*s*). A contract to deliver saddles at 24 or 26 shillings may be stated as a contract to deliver them at a reasonable price (*t*). A contract for the purchase of *about* eight tons may be stated to be for eight tons, if that had been ascertained to be the precise quantity (*u*). A contract to pay an authorized agent, or one who is in effect an agent of the plaintiff, may be declared upon as a contract to pay the plaintiff himself (*x*). So, the plaintiff is not bound to state more of the contract than is essential to the action which he brings for the particular breach; as, where the contract was for a quantity of *prime singed bacon,* and the plaintiff declared for the non-delivery of *prime bacon* (*y*). And where something is stated which is not essential to the action, and is stated wrong, an amendment will be allowed; as where, in describing the

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(*s*) *Silver* v. *Heseltine*, 1 Chit. Rep. 39.

(*t*) *Laing* v. *Fidgeon*, 6 Taunt. 108. See *Bayley* v. *Tricker*, 2 N. R. 458; *Bray* v. *Freeman*, 2 B. Moore, 114.

(*u*) *Gladstone* v. *Neale*, 13 East, 410; *Wickes* v. *Gordon*, 2 B. & A. 335 (overruling *Payne* v. *Hayes*, Bull. N. P. 145); *Wildman* v. *Glossop*, 1 B. & A. 9; *Crispin* v. *Williamson*, 8 Taunt. 107.

(*x*) *Pearson* v. *Pearson*, 5 B. & Ad. 859; see *per* Parke, J., id. 864.

(*y*) *Cotterill* v. *Cuff*, 4 Taunt. 285; *Miles* v. *Sheward*, 8 East, 7; *Parker* v. *Palmer*, 4 B. & A. 387; *Baptiste* v. *Cobbold*, 1 B. & P. 7; *Tempest* v. *Rawling*, 13 East, 18; *Handford* v. *Palmer*, 2 B. & B. 359; S. C. 5 B. Moore, 74.

terms of a warranty, some qualification, not involved in the breach, is accidentally omitted (*z*). Variance.

By a recent statute (*a*), the Court, or Judges sitting at *nisi prius*, are empowered in certain cases to allow the record to be amended. It is provided, "that it shall be lawful for any Court of "record holding plea in civil actions, and any "Judge sitting at nisi prius, if such Court or Judge "shall see fit so to do, to cause the record, writ, "or document, on which any trial may be pending "before any such Court or Judge in any civil "action, &c., when any variance shall appear be- "tween the proof and the recital or setting forth "on the record, &c., of any contract, custom, pre- "scription, name, or other matter, in any particu- "lar or particulars in the judgment of such "Court or Judge *not material to the merits of the* "*case*, . . . to be forthwith amended." It is further provided, that the party, who is dissatisfied with the decision of the Judge at *nisi prius* respecting his allowance of such amendment, may apply to the Court from which the record or writ issued for a new trial upon that ground (*b*). When amendment allowed.

(*z*) *Hemming* v. *Parry*, 6 C. & P. 580.

(*a*) 3 & 4 Will. IV. c. 42, s. 23.

(*b*) The amendment is allowed whether the variance be such that the other party "may have been prejudiced thereby in the conduct of his action, prosecution or defence," or whether it be such that the other party may not have been so prejudiced; but there is a difference between the cases in respect of *costs*; (see the

II. PERFORMANCE OF CONDITIONS PRECEDENT.

Conditions precedent.

Where there is a condition precedent, or a concurrent act, to be performed on the part of the vendor, no action can be maintained by him against the purchaser, without proof of performance, or of something which is in law equivalent to performance (*b*). Thus, in general, where, by the express terms of the contract, some act on the part of the plaintiff is to precede performance by the defendant, it is incumbent on the plaintiff to prove performance on his own part. Yet, if the circumstances of the case show, that the former act was not intended by the parties to be a condition precedent, proof of performance by the plaintiff is unnecessary: thus, where the agreement expressed that the goods were to be paid for *two months after they were landed*, it was held, that the

Expressed.

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same section). Under this statute the Court allowed the word "guarantee" used in the written contract, to be substituted for the word "pay" in the declaration; *Hanbury* v. *Ella*, 1 Ad. & Ell. 61. Most of the new rules of pleading proceed upon this enactment; see 1 Ad. & Ell. 64; see rules Hil. T. 4 Will. IV. § 5. [The stat. 9 Geo. IV. c. 15, allowed an amendment in certain cases, where a "variance appeared between any matter in writing "or in print produced in evidence, and the recital or setting forth "thereof upon the record." See *Lamey* v. *Bishop*, 4 B. & Ad. 479; *Masterman* v. *Judson*, 8 Bingh. 224.]

(*b*) *Ughtred's* case, 7 Rep. 10 a; *Phillips* v. *Fielding*, 2 H. Bl. 123; *Thomas* v. *Cadwallader*, Willes, 496; *Collins* v. *Gibbs*, 2 Burr. 899; *Wright* v. *Newton*, 2 Cr. Mees. & R. 124. See 1 Wms'. Saund. Rep. 320 a, note to *Pordage* v. *Cole*.

landing of the goods was not a condition precedent, although it was expressed to precede the payment, but that the object of the stipulation was merely to mark the time of payment, and that the plaintiff, therefore, might maintain an action for the price, although the goods were in fact never landed at all, having been lost before their arrival (*c*). Conditions precedent.

If there is a condition precedent implied by law, although not expressed in the contract, proof of performance is necessary. Thus, in an action for not accepting stock, the plaintiff must show that he was possessed of the stock at the time of the contract (*d*); otherwise it would be void within the Stock-jobbing Act (*e*). He must also prove that, according to the provisions of the statute (*f*), the stock, contracted for by the defendant, and refused to be accepted by him, was sold within a reasonable time afterwards to some other person (*g*). So, the plaintiff must show either a tender and refusal, or, what is equivalent to a tender and refusal, that he was ready to transfer, Implied.

(*c*) *Alexander* v. *Gardner*, 1 Bingh. N. S. 671; S. P. *Fragano* v. *Long*, 4 B. & C. 219; S. C. 6 D. & R. 283. See below, *Assumpsit for goods sold;* and Part 4, Chap. ii.

(*d*) *Breton* v. *Cope*, Peake, 39. See *Bryan* v. *Lewis*, 1 Ry. & Moo. 386; *Wilkinson* v. *Myer*, 1 Stra. 585.

(*e*) 7 Geo. II. c. 8, s. 8; *supra*, pp. 92, 93.

(*f*) 7 Geo. II. c. 8, s. 6.

(*g*) *Hekscher* v. *Gregory*, 4 East, 607; *Bordenave* v. *Gregory*, 5 East, 107. See 2 Stark. Ev. 873, (2d Ed.).

Conditions precedent.

and remained at the Bank as long as the transfer books continued open (*h*). Where the declaration stated, that, in consideration of the payment of a sum of money, defendant promised to deliver fifteen tod of wool out of seventeen tod, *to be chosen by the plaintiff*, and averred, that the plaintiff was ready to pay the money at the day, yet defendant did not deliver the wool, judgment for the plaintiff was arrested, because it was not stated that the plaintiff had chosen fifteen tod out of the seventeen,—such selection being an implied condition precedent to the delivery (*i*). If a condition precedent has been neglected to be performed, it seems to be immaterial whether the defendant has been prejudiced or not by the non-performance (*k*), or whether he objected to fulfil the contract on that particular ground (*l*). But, if the defendant has once actually waived his objection to the non-performance, he cannot afterwards take advantage of it (*m*).

Sale by sample.

Where the goods are sold by sample, the vendor must show that the bulk of the commodity corresponds with the sample; and it will not be sufficient to prove a custom of making an allowance

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(*h*) *Bordenave* v. *Gregory*, 5 East, 107 ; *Lancashire* v. *Killingworth*, 1 Ld. Raym. 686; S. C. Com. Rep. 116.

(*i*) *Raynay* v. *Alexander*, Yelv. 76; Selw. N. P. 113, (8th Ed.).

(*k*) *Busk* v. *Spence*, 4 Campb. 329.

(*l*) *Morgan* v. *Birnie*, 9 Bingh. 672.

(*m*) 1 Bingh. N. S. 671.—Post.

for the inferior quality (*n*). The purchaser is at liberty to inspect the bulk, and to compare it and the sample together, and if they are not found to correspond, or if the vendor refuses to allow the inspection, the purchaser may rescind the contract (*o*). But if there is a sale-note which does not refer to any sample, it is no defence that they do not correspond with a sample exhibited (*p*); though a cross action might lie for the deceit. Conditions precedent.

So, where the goods are sold with a warranty, or an express representation of their quality, the plaintiff must show that they are conformable thereto (*q*); and it will not be sufficient to prove that they correspond with a sample exhibited at the time of the sale (*r*). But where the contract was, that such quantity as might be deemed unmerchantable should be rejected, the vendee was held bound to accept so much as should be proved to be of merchantable quality (*s*). Sale with warranty.

Where the vendor agrees to deliver the goods at a *particular place*, he cannot recover without proof of delivery there. If the agreement was, to deliver "free on board a foreign ship," the seller is bound Delivery at particular place.

(*n*) *Hibbert* v. *Shee*, 1 Campb. 113.

(*o*) *Lorymer* v. *Smith*, 1 B. & C. 1.

(*p*) *Meyer* v. *Everth*, 4 Campb. 22.

(*q*) *Lewis* v. *Cosgrave*, 2 Taunt. 2. *Per* Lord *Tenterden*, C. J., 2 B. & Adol. 463.

(*r*) *Tye* v. *Fynmore*, 3 Campb. 462.

(*s*) *Graham* v. *Jackson*, 14 East, 498.

Conditions precedent.

to put the goods on board a foreign ship named by the purchaser(*t*).

Delivery at particular time.

So it is, where a *particular time* is specified. If the contract agreed upon is, that the goods shall be delivered "with convenient speed, but not to exceed a given day," the arrival, in time for delivery on that day, is a condition precedent to the vendor's right of action; and if he makes default in the time, the purchaser is not bound to receive the goods(*u*). However, where it was stipulated, that the goods should be despatched from a certain place by a particular day, it was held sufficient that the goods were shipped by that day, though the vessel did not sail until afterwards (*x*).

Delivery of particular quantity.

So it is, where a *particular quantity* is specified. If the contract expresses, that a certain quantity of goods shall be delivered, the purchaser is not bound to accept part only; and unless the whole

(*t*) *Wackerbath* v. *Masson*, 3 Campb. 270; *Wetherell* v. *Coape*, 3 Campb. 272, n.

(*u*) *Cox* v. *Todd*, 7 D. & R. 131; *Alewyn* v. *Pryor*, 1 Ry. & Moo. 406. See *Maryon* v. *Carter*, 4 C. & P. 295. If the delivery is to take place, or other condition is to be performed within a *month*, this will in general be taken to mean a lunar and not a calendar month, (*Jocelyn* v. *Hawkins*, 1 Str. 446; *Barksdale* v. *Morgan*, 4 Mod. 185); unless it be understood otherwise, (*Titus* v. *Lady Preston*, 1 Str. 652. See *Cochran* v. *Retberg*, 3 Esp. 121).

(*x*) *Busk* v. *Spence*, 4 Campb. 329. It seems that the delay of a day or two would not be considered material, unless notice has been given of an intention to insist on the punctual performance of the agreement on the very day specified; see *Carpenter* v. *Blandford*, Dan. & Lloyd, Merc. Ca. 175.

quantity has been tendered, the vendor cannot recover (*y*). Thus, where a party, contracting for the purchase of land, agreed to take the crops at a valuation, it was held, that the vendor, having failed to make out a good title to the land, could not maintain assumpsit for the crops (*z*). But if the vendee has accepted part, the contract is severed, and, as the delivery of the residue is no longer a condition precedent to the right of action by the vendor for the part supplied, he may recover in an action for that portion (*a*), or he may set off the value, in an action for any other claim brought against him by the purchaser (*b*). "If, indeed, the entire contract was, to deliver a large quantity of goods, consisting of distinct parcels, within a specified time, and the seller delivers part,

Conditions precedent.

(*y*) *Champion* v. *Short*, 1 Campb. 53; *Baldey* v. *Parker*, 2 B. & C. 37; *Symonds* v. *Carr*, 1 Campb. 361; *Chambers* v. *Griffiths*, 1 Esp. 150; *Hort* v. *Dixon*, Selw. N. P. 109. Nor is the purchaser bound to accept a *greater* quantity; and where the contract was that the defendant should purchase "about 300 quarters, more or less," this was held not to contemplate so large an excess as 50, over 300, quarters; *Cross* v. *Eglin*, 2 B. & Adol. 106.

(*z*) *Neal* v. *Viney*, 1 Campb. 471. See *Hungerford* v. *Haviland*, 3 Bulstr. 325, 326. Otherwise, if the contracts were distinct and separate; *Poole* v. *Shergold*, 2 Bro. C. C. 118; *Drewe* v. *Hanson*, 6 Ves. Jun. 676.

(*a*) *Oxendale* v. *Wetherell*, 9 B. & C. 386 (overruling *Walker* v. *Dixon*, 2 Stark. N. P. C. 281); *Mavor* v. *Pyne*, 3 Bingh. 285; *Bragg* v. *Cole*, 6 B. Moore, 114. See below, *Assumpsit for goods sold.*

(*b*) *Shipton* v. *Casson*, 5 B. & C. 378.

Conditions precedent.

he cannot before the expiration of that time bring an action to recover the price of that part delivered, because the purchaser may, if the vendor fail to complete the contract, return the part delivered "(*c*). But if the purchaser does not so rescind the contract, it would be most unjust to say that the seller should not recover at all; for, "it would follow that, where there had been a contract for 250 bushels of wheat, and 249 had been delivered to, and retained by, the defendant, the seller could not recover for the 249, because he had not delivered the whole" (*d*).

Tender of the goods.

Where the vendor ought to have tendered the goods, he cannot recover without proof of such tender; as in the sale of stock (*e*). But, where nothing is stipulated about delivery, it seems that the purchaser ought to fetch them: in such case a tender is unnecessary (*f*), and it will be sufficient to aver a readiness to deliver (*g*).

Mutual dependent promises.

Again, it is laid down,—although there be mutual promises, yet if one thing be the consideration of the other, there a performance is necessary to be averred and proved (*h*). "If two men agree, one

(*c*) *Per Parke*, J., *Oxendale* v. *Wetherell*, 9 B. & C. 388.

(*d*) *Per* Lord *Tenterden*, C. J., ib. 387.

(*e*) *Bordenave* v. *Gregory*, 5 East, 107.—Supra.

(*f*) 2 Stark. Ev. 871, n. (2d Ed.).

(*g*) Ibid. *Rawson* v. *Johnson*, 1 East, 203.

(*h*) *Callonell* v. *Briggs*, 1 Salk. 112; *Morton* v. *Lamb*, 7 T. R. 125.

that the other should have his horse, the other that he will pay ten pounds for it, an action does not lie for the money until the horse be delivered" (*i*). Where the contract was, that the defendant should supply certain goods at intervals, to be paid for on delivery, he is not bound to sell on credit, and, if the purchaser refuses to pay on delivery, the vendor is not liable for non-performance (*k*), even though he may have waived the condition in part by delivering some of the goods on credit (*l*). On the same principle, where the plaintiff had agreed with the defendant to barter a quantity of yellow ochre for a quantity of sponge of equivalent value, and it was contended that, the respective undertakings being mutual promises, performance on the part of the plaintiff was not necessary to support his right of action, the Court nevertheless held, that one undertaking was the consideration of the other, and that the plaintiff, therefore, could not recover for the non-delivery of the sponge, without proof of the delivery of the ochre (*m*). However, after verdict, the averment is sufficient, that plaintiff has always been *ready and willing to perform* his part of the contract (*n*);

Conditions precedent.

(*i*) *Per Holt*, C. J., *Thorpe* v. *Thorpe*, 1 Salk. 172. See *Heard* v. *Wadham*, 1 East, 619; *Tate* v. *Meek*, 8 Taunt. 280, 293.

(*k*) *Withers* v. *Reynolds*, 2 B. & Adol. 882.

(*l*) *Payne* v. *Shadbolt*, 1 Campb. 427.

(*m*) *Parker* v. *Rawlings*, 4 Bingh. 280.

(*n*) *Waterhouse* v. *Skinner*, 2 B. & P. 447; *Rawson* v. *Johnson*,

Conditions precedent.

and proof of a demand by plaintiff will support such averment (*o*).

When performance excused.

If the plaintiff has been prevented by the act of the defendant himself, from performing his part of the contract, this is equivalent to performance (*p*); as, where there has been a tender and refusal (*q*). So, where he has been discharged by defendant from the performance (*r*). And, if the defendant has once waived the non-performance of a condition precedent, even if default had been already made, he cannot afterwards take the objection (*s*). But the plaintiff is not excused on the ground that some third party has wrongfully prevented the performance (*t*). For, if a man bind himself absolutely to perform a particular act, he is bound by his contract, although circumstances, over which he has no control, may happen to render the performance impossible (*u*). But, if he has

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1 East, 203; *Ferry* v. *Williams*, 8 Taunt. 62; S.C. 1 B. Moore, 498.

(*o*) *Squier* v. *Hunt*, 3 Price 68.—Post.

(*p*) *Hotham* v. *E. I. Company*, 1 T. R. 638; *Dorrien* v. *Hutchinson*, 1 Smith, Rep. 420; *Studdy* v. *Sanders*, 5 B. & C. 628. See *Pringle* v. *Taylor*, 2 Taunt. 150; *Giles* v. *Edwards*, 7 T. R. 181; *Bowdell* v. *Parsons*, 10 East, 359.

(*q*) *Lea* v. *Exelby*, Cro. Eliz. 888.

(*r*) *Jones* v. *Barkly*, 2 Dougl. 684.

(*s*) *Alexander* v. *Gardner*, 1 Bingh. N. S. 671.

(*t*) *Worsley* v. *Wood* (in error), 6 T. R. 710. See *Gosling* v. *Higgins*, 1 Campb. 451.

(*u*) *Splidt* v. *Heath*, 2 Campb. 57, n.; *Atkinson* v. *Ritchie*, 10 East, 530.

provided against the contingency of the performance becoming impossible, he will not be liable (*x*). Conditions precedent.

Where there are mutual promises independent of each other, and mutual remedies, an action may be maintained by either party without averring performance (*y*). Most of the old cases, and many of the modern, upon this subject, are decided upon merely technical distinctions: but the Courts now construe covenants and promises, to be either dependent or independent of each other, according to the intention and meaning of the parties, and the good sense of the case (*z*). "Whether one *promise* be the consideration of another, or whether the *performance*, and not the mere promise, be the consideration, must be gathered from, and depends entirely upon, the words and nature of the agreement" (*a*). Mutual independent promises.

III. DAMAGES.

The vendor, in an action on the special contract for not accepting goods, is not entitled to recover Measure of damages.

(*x*) *Boyd* v. *Siffkin*, 2 Campb. 326; *Hawes* v. *Humble*, 2 Campb. 327 n; *Hayward* v. *Scougall*, 2 Campb. 56; *Thornton* v. *Simpson*, 2 Marsh. 267; S. C. 6 Taunt. 556.

(*y*) Selw. N. P. 121; *Martindale* v. *Fisher*, 1 Wils. 88; *Lampleigh* v. *Braithwait*, Hob. 106; *Blackwell* v. *Nash*, 1 Stra. 535; *Lock* v. *Wright*, id. 569; *Weaver* v. *Sessions*, 6 Taunt. 154.

(*z*) 1 Wms'. Saund. Rep. 320 a.

(*a*) *Per Lawrence* J., *Glazebrook* v. *Woodrow*, 8 T. R. 373.

Damages. the value of the goods themselves, because he has still the property and disposition of them, but he is entitled only to such damages as he can be reasonably supposed to have sustained by the default of the purchaser (*b*). As any loss, caused by a fall in the market, necessarily results from the defendant's breach of contract, the amount of damage sustained must be measured by the difference between the price, which the defendant contracted to pay, and the price which might have been obtained in the market at the time when the contract should have been completed (*c*). On the same principle, if the goods have been sold at a loss to some other person, the defendant is liable to make good the loss incurred on such resale (*d*): or, if the goods have remained in the vendor's warehouse, encumbering the premises, he may recover,

(*b*) See *Towers* v. *Barrett*, 1 T. R. 133, 136.

(*c*) *Boorman* v. *Nash*, 9 B. & C. 145; S. C. Dan. & Lloyd, Merc. Ca. 269; *Brandt* v. *Bowlby*, 2 B. & Ad. 932. In the latter case, the action was by the consignors, foreign merchants, against the ship-owners, who had delivered the goods contrary to the bill of lading; and the measure of damages was held to be regulated, not by the invoice price, but by the value at the time when the cargo ought to have been delivered, i. e. the value at the port of discharge. The original consignees had refused to perform their stipulated part of the contract, and an action would clearly have been maintainable against them for not accepting, in which the measure of damages would have been the same.

(*d*) *Maclean* v. *Dunn*, 4 Bingh. 722. "If neither the money be paid, nor the goods delivered, nor tender made, nor any subsequent agreement entered into, it is no contract, and the owner may dispose of the goods as he pleases;" 2 Bl. Comm. 447.

either for warehouse room, or any special damage which may have resulted from the delay (*e*). If the goods were to have been paid for by a bill, the vendor is entitled to recover interest from the day on which it would have become due (*f*), whether the goods have been accepted or not. Damages.

ASSUMPSIT FOR GOODS BARGAINED AND SOLD.

WHERE the property has vested in the purchaser, the vendor may sue for goods bargained and sold; in which form of action he is entitled to recover the whole value of the goods (*a*), while in a special action for not accepting, he can only recover such damages as the jury may give for the breach of the contract. Goods bargained and sold.

This is the proper form of action, where there has not been such a delivery of the goods, in fact or in law, as will support an action for goods sold and delivered; as, where the terms of the contract are, that the goods shall remain on the premises of the vendor until they are paid for by the purchaser (*b*). When proper form of action.

(*e*) *Greaves* v. *Ashlin*, 3 Campb. 427, *per* Lord *Ellenborough*, C. J.

(*f*) *Boyce* v. *Warburton*, 2 Campb. 480; *Porter* v. *Palsgrave*, 2 Campb. 472; *Marshall* v. *Poole*, 13 East, 98.

(*a*) *Hankey* v. *Smith*, Peake, 42, n.

(*b*) *Goodall* v. *Skelton*, 2 H. Bl. 316. Judgment of Lord *Lyndhurst*, C. B., *Boulter* v. *Arnott*, 3 Tyrw. 269.—Post.

Goods bargained and sold.

In order to maintain an action for goods bargained and sold, it must appear, that the property has absolutely vested in the purchaser; therefore, it was held, that this form of action could not be supported, where the defendant had ordered certain machines to be made, and, when they were completed, refused to accept them(*c*). Under such circumstances it ought to have been a special action for not accepting(*d*); because, where the chattel is not in existence at the time of the contract, the property does not pass by the contract, but by the completion and delivery of the chattel(*e*). Further, not only must the property pass, but there must be a *specific appropriation* by the purchaser(*f*); therefore, where goods have been contracted to be sold at a certain price per ton, it is said this action will not lie until the goods have

(*c*) *Atkinson* v. *Bell*, 8 B. & C. 277; S. C. Dan. & Lloyd, Merc. Ca. 93. "No right to maintain any action vests in the plaintiff during the progress of the work; but when the chattel has assumed the character bargained for, and the employer has accepted it, the party employed may maintain an action for goods sold; or, if the employer refuses to accept, a special action on the case for such refusal;" *Per Bayley*, J., 8 B. & C. 283. See 10 Bingh. 516.—Post.

(*d*) *Per curiam*, 8 B. & C. 281.

(*e*) *Mucklow* v. *Mangles*, 1 Taunt. 318; *Thompson* v. *Maceroni*, 3 B. & C. 1.—Post. But see the remarks of the judges on the case of *Mucklow* v. *Mangles*, in *Carruthers* v. *Payne*, 5 Bingh. 276, *et seq.*

(*f*) *Elliott* v. *Pybus*, 10 Bingh. 512; S. C. 4 M. & Scott, 389; *Per Bayley*, J., *Rohde* v. *Thwaites*, 6 B. & C. 392; *per Holroyd*, J., 8 B. & C. 284. See Dan. & Lloyd, Merc. Ca. 100.

been weighed(*g*). It is not necessary that the vendor at the time of the contract should have been in the actual possession of the goods, provided that they have been ascertained and accepted before the action was brought(*h*). Goods bargained and sold.

Where the purchaser has refused to accept the goods, and the vendor has resold them, the proper form of action is assumpsit for not accepting(*i*). It has been held, indeed, that the plaintiff might in such case sue for goods bargained and sold(*k*). But the decision seems now to be overruled(*l*): because, although there is not such a waiver of the contract as to preclude the vendor from recovering damages for the breach (since it is admitted that he is justified in re-selling on the purchaser's non-acceptance), yet, as by his own act he has so far rescinded the contract, that he is no longer in a situation to deliver the goods to the defendant, it would be inconsistent to allow him to recover the price: and, moreover, the damages actually sustained would be, not the whole value of the goods, but the difference between the contract price and

(*g*) *Per Littledale*, J., *Simmons* v. *Swift*, 5 B. & C. 865.

(*h*) *Alexander* v. *Gardner*, 1 Bingh. N. S. 671, 676; *Rohde* v. *Thwaites*, 6 B. & C. 388.

(*i*) *Maclean* v. *Dunn*, 4 Bingh. 722.

(*k*) *Mertens* v. *Adcock*, 4 Esp. 251, *cor.* Lord *Ellenborough*, C. J.

(*l*) *Hore* v. *Milner*, Peake, 42, n.; *James* v. *Shore*, 1 Stark. N. P. C. 430. See judgment of the Court, *Hagedorn* v. *Laing*, 6 Taunt. 166, 167; judgment of *Best*, C. J., *Maclean* v. *Dunn*, 4 Bingh. 728.

Goods bargained and sold.

the sale price, which would be the precise measure of damages in an action for not accepting (*m*). It has been held, however, that an action for goods bargained and sold is not precluded by the circumstance that the vendor has stopped them *in transitu*, provided the plaintiff is ready to deliver them to the defendant (*n*); for the right of stopping *in transitu* does not proceed on the ground of rescinding the contract, but is an equitable lien adopted by the law for the purposes of substantial justice (*o*).

ASSUMPSIT FOR GOODS SOLD AND DELIVERED.

Goods sold and delivered.

IN an action of assumpsit for goods sold and delivered, the plaintiff must prove a contract of sale, or circumstances from which a contract may be implied in law;—a delivery of the goods to the defendant, either in law, or in fact;—and the value of the goods sold.

I. WHEN THE ACTION IS MAINTAINABLE.

When maintainable.

Proof that the defendant has received and used the goods, for which the action is brought, is in general *primâ facie* evidence to support an action for goods sold and delivered (*p*); because, where

(*m*) *Supra*, p. 240.

(*n*) *Kymer* v. *Suwercropp*, 1 Campb. 109.

(*o*) 7 T. R. 445.—*Supra*.

(*p*) *Bennett* v. *Henderson*, 2 Stark. N. P. C. 550. And as to implied liability, see *Jewry* v. *Busk*, 5 Taunt. 302; *Cox* v. *Reid*, Ry. & Moody, 199; *Morris* v. *Burdett*, 2 M. & S. 212; 1

goods, which have been the property of the plaintiff, have come into the possession of the defendant, unaccounted for, the law will imply a contract. Thus, where the vendor intended to supply the goods to a party who has never received them, and, without the plaintiff's knowledge, they come into the possession of another, the value may be recovered in an action for goods sold against the latter(*q*). And, as the defendant cannot take advantage of his own wrong, the plaintiff may in general waive the *tort*(*r*), when the goods have come wrongfully into the defendant's possession, and sue for goods sold; provided he can make out a clear and indisputable title to the property(*s*). Thus, the action may be maintained where the defendant fraudulently procured the goods to be sold to one whom he knew to be insolvent, and afterwards got them into his own hands(*t*); or, where he supplied money to a nominal vendee to pay part of the price, and afterwards obtained the pro-

When maintainable.

Waiver of tort.

Campb. 218; *Frazer* v. *Marsh*, 2 Campb. 517; *Trewhella* v. *Rowe*, 11 East, 435; *Essery* v. *Cobb*, 5 C. & P. 358.

(*q*) *Weatherby* v. *Banham*, 5 C. & P. 228.

(*r*) *Foster* v. *Stewart*, 3 M. & S. 191; *Lightly* v. *Clouston*, 1 Taunt. 112; *King* v. *Leith*, 2 T. R. 141; *Feltham* v. *Terry*, Lofft, 207, cited 1 T. R. 387; *Longchamp* v. *Kenny*, 1 Dougl. 137; *Hussey* v. *Fidell*, 3 Salk. 59; 1 Chitty's Pl. 89. Unless the fraud actually amounts to felony; *Thorp* v. *How*, Bull. N. P. 130; *Sampson* v. *Gisling*, ib. 131. See 1 Hale, P. C. 546.

(*s*) *Lee* v. *Shore*, 1 B. & C. 94. See *per Abbott*, C. J., ib. 97.

(*t*) *Hill* v. *Perrott*, 3 Taunt. 274; *Biddle* v. *Levy*, 1 Stark. N. P. C. 20; *Thompson* v. *Bond*, 1 Campb. 4.

When maintainable.

ceeds arising from the resale(*u*). And it seems that, even where the vendor has mistakenly treated the case as one of fraud, or even of felony, this will not preclude him from afterwards recovering the price(*x*).

Against *quasi* vendee.

On the same principle, in all cases where the defendant in effect stands in the relation of vendee, or *quasi* vendee, towards the plaintiff, the action for goods sold is maintainable. Thus, where the original vendee, being unable to pay, transferred the goods to the defendant, who promised to pay the price, it was held that an action would lie for goods sold, because this amounted to an original contract, and was not a mere guaranty to pay the debt of another(*y*). If, however, the sale had been to a third party, and defendant had been merely a guarantee, the vendor could not have recovered against him in an action for goods sold, but ought to have declared specially on the guaranty(*z*). Yet, if the original credit was in fact given to the defendant himself, though the goods may have been for the use of another, he would be primarily liable, and assumpsit for goods sold

(*u*) *Abbotts* v. *Barry*, 2 B. & B. 369. See *Studdy* v. *Sanders*, 5 B. & C. 628.

(*x*) *Verey* v. *Wilmot*, Lloyd & Welsby, Merc. Ca. 39.

(*y*) *Browning* v. *Stallard*, 5 Taunt. 450. See *Oldfield* v. *Lowe*, 9 B. & C. 73.

(*z*) *Mines* v. *Sculthorpe*, 2 Campb. 215.

might be supported (*a*). It is in general a question for the jury, to whom the credit has been given (*b*): and, if the vendor has once given the credit solely and exclusively to some third person, he cannot transfer his claim to the defendant (*c*). When maintainable.

Where there has been a special agreement, it is said that the plaintiff ought in general to declare specially (*d*), instead of the common count for goods sold. Thus, where the contract was proved to have been, that the goods should be paid for partly in money and partly in buttons, Buller, J., nonsuited the plaintiff on the ground that he ought to have declared on the special agreement (*e*); and where goods were sent *on sale or* Special agreement.

(*a*) *Keate* v. *Temple*, 1 B. & P. 158; *Brooker* v. *Wood*, 5 B. & Adol. 1052. See *Simpson* v. *Penton*, 2 Cr. & Mees. 430; *Edge* v. *Frost*, 4 D. & R. 243.

(*b*) *Storr* v. *Scott*, 6 C. & P. 241; *Eaden* v. *Titchmarsh*, 1 Ad. & Ell. 691; *Jennings* v. *Griffiths*, Ry. & Moo. 44.

(*c*) *Baker* v. *Buckle*, 7 B. Moore, 349. See *Bramah* v. *Abingdon*, cited 15 East, 66; *Patterson* v. *Gaudassequi*, 15 East, 62.—Post.

(*d*) 1 Chitt. Pl. 302. See *Lightfoot* v. *Creed*, 8 Taunt. 268; S. C. 2 B. Moore, 255; *Hoppe* v. *Symonds*, 2 Chit. Rep. 324; *Davis* v. *Nicholls*, 2 Chit. Rep. 320; *Baker* v. *Dewey*, 1 B. & C. 704; *Dunn* v. *Body*, 1 Stark. N. P. C. 220; *Rees* v. *Manners*, 3 Smith, Rep. 119; *Weaver* v. *Burrough*, 1 Stra. 648. [The special agreement may be given in evidence by the defendant, without being specially pleaded under the New Rules, *Alexander* v. *Gardner*, 3 Dowl. P. C. 146.]

(*e*) *Harris* v. *Fowle*, cited 1 H. Bl. 287; *Talver* v. *West*, Holt, N. P. C. 178.

Special agreement.

return, i. e. on the understanding, that, if they were not returned within a specified time, they were to be considered as sold, Lord Ellenborough is reported to have been clearly of opinion that an action for goods sold could not be supported(*f*). However, it has been frequently held at nisi prius that a special count is not necessary in such case, and that an action for goods sold will lie after the expiration of the specified time(*g*). So, where defendant agreed to give a gun and a certain sum of money in exchange for another gun, it was held, that, upon his refusal to perform the agreement according to the terms, an obligation resulted to pay in money, and that the general count was sufficient(*h*). So, where there has been a special contract, of which part has been performed, but the part executory has been rescinded(*i*), or under the circumstances is not available(*k*), the plaintiff may recover on the common count for the part executed. It is laid down generally, that, where the duty of the defendant is simply to pay money, the general indebitatus count is usual and most

(*f*) *Lyons* v. *Barnes*, 2 Stark. N. P. C. 39.

(*g*) *Harrison* v. *Allen*, 1 C. & P. 235; *Coleman* v. *Gibson*, 1 M. & Rob. 168; *Bailey* v. *Gouldsmith*, Peake, 56. See *Barbe* v. *Parker*, 1 H. Bl. 283.

(*h*) *Forsyth* v. *Jervis*, 1 Stark. N. P. C. 437; *Sheldon* v. *Cox*, 3 B. & C. 420; S. C. 5 D. & R. 277.

(*i*) *Oxendale* v. *Wetherell*, 9 B. & C. 386.—Post.

(*k*) *Mavor* v. *Payne*, 3 Bingh. 285; S. C. 2 C. & P. 91.

advisable(*l*). And it is said, that such form of action is maintainable, although there be a special agreement, if such special agreement does not, by express stipulation or necessary intendment, preclude the plaintiff from recovering(*m*). Special agreement.

Where, by the terms of the contract, *credit* is to be given to the purchaser, the vendor cannot under any circumstances maintain an action for goods sold until the time of credit has expired. If he subsequently discovers that the defendant is guilty of fraud, and that he never intended to give a bill in payment according to the terms of the contract, or that the bill if given is valueless, the vendor ought to rescind the contract, and sue in trover to recover the goods themselves (*n*). So, if the purchaser, by way of payment for the goods, has given his acceptance to a bill to which the drawer's name was afterwards to be added by the vendor, the original debt is suspended until the time has run on the instrument; therefore, until that time has expired, the vendor cannot have recourse to Sale on credit.

(*l*) *Per Parke*, J., *Streeter* v. *Horlock*, 1 Bingh. 37. See *Ingram* v. *Shirley*, 1 Stark. N. P. C. 185; Bull. N. P. 139.

(*m*) *Per Gibbs*, C. J., *Robson* v. *Godfrey*, Holt, N. P. C. 237. See *Adams* v. *Fairbairn*, 2 Stark. N. P. C. 277; *Harris* v. *Oke*, Bull. N. P. 140; *Payne* v. *Bacomb*, 2 Dougl. 651; *Alexander* v. *Gardner*, 1 Bingh. N. S. 671; *Pearson* v. *Pearson*, 5 B. & Ad. 859.

(*n*) *Strutt* v. *Smith*, 1 Cr. Mees. & R. 312; *Fergusson* v. *Carrington*, 9 B. & C. 59; S. C. Dan. & Lloyd, Merc. Ca. 198; 3 C. & P. 457; see below, Chap iv.

Sale on credit.

his demand for goods sold, although the bill remain unnegotiated in his hands and without any drawer's name thereto (*o*). If the purchaser, without fraud, refuses to perform the contract by giving a bill or note in payment according to his undertaking, the proper remedy is an action for the breach of the special agreement (*p*). Thus, where the purchaser is to pay in three months by a bill at two, the credit is for five months, and he cannot be sued for goods sold before that time has expired (*q*). So, where the goods are sold at six months' credit, payment to be then made by a bill at *two or three* months at the purchaser's option, this is in effect nine months' credit (*r*). And, where the sale is at six or nine months' credit, the purchaser, by not paying at the end of the six months, makes his election to take credit for the nine (*s*). But, where some act was to be done by the purchaser to signify his assent to take the extended credit, and he has omitted to perform such act, he will be held to have waived his option of extending the credit; thus, where the goods were sold at three months' credit, and the plaintiff was then to

(*o*) *Simon* v. *Lloyd*, 2 Cr. Mees. & R. 187.

(*p*) *Mussen* v. *Price*, 4 East, 147; *Miller* v. *Shawe*, cited 4 East, 149; *Dutton* v. *Solomonson*, 3 B. & P. 582; *Seymour* v. *Pychlau*, 1 B. & A. 14; see *Day* v. *Picton*, 10 B. & C. 120; *Hoskins* v. *Duperoy*, 9 East, 498.

(*q*) *Mussen* v. *Price*, 4 East, 147.

(*r*) *Helps* v. *Winterbottom*, 2 B. & Adol. 431.

(*s*) *Price* v. *Nixon*, 5 Taunt. 338; see 2 B. & Ad. 436.

take the defendant's bill for three months, if further time should be wished for, an action for goods sold will lie immediately after the expiration of the first three months, unless the bill is then given (*t*). Sale on credit.

It has been held, that, if it be intended to set up the defence that the sale was on credit, and that the time has not expired, this must be specially pleaded (*u*); but the decision has since been doubted (*x*).

After the expiration of the time of credit, the plaintiff need not declare specially, but may recover in an action for goods sold (*y*). Indeed the latter seems in strictness the proper form of action, because the damages in the other might not be for the full value of the goods, but merely for the special damage which the vendor could prove that Maintainable after credit has expired.

(*t*) *Nickson* v. *Jepson*, 2 Stark. N. P. C. 227.

(*u*) *Edmunds* v. *Harris*, 4 Nev. & M. 182; S. C. 6 C. & P. 547; see Rules Hil. T. 4 Will. IV.—Post.

(*x*) *Per Parke*, B., 1 Cr. Mees. & R. 743. And it seems the decision cannot be supported: for, if the plaintiff in effect declares upon a ready money contract, the defendant, under the issue that he did not undertake or promise in manner and form, &c., must be at liberty to show that it was a credit transaction; it would not be matter in *confession and avoidance*, but in *denial*. See the Reporters' note, 4 Nev. & Man. 183.

(*y*) *Brooke* v. *White*, 1 N. R. 330; *Swancott* v. *Westgarth*, 4 East, 75; *Heron* v. *Granger*, 5 Esp. 271; See *per Chambre*, J., *Miller* v. *Shawe*, cited 4 East, 149; *per* Lord *Tenterden*, C. J., 2 B. & Adol. 434. Lord *Alvanley*, C. J., once expressed a contrary opinion, 3 B. & P. 586.

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he had sustained from the default of the purchaser in not giving a bill in payment according to his undertaking (*z*). Where a bill or note has been given for goods, and is subsequently dishonoured, the vendor may sue for the price of the goods immediately (*a*), provided that the bill is not in the hands of third parties who may call upon the defendant for payment (*b*), and provided that the instrument has not, by *laches* on the part of the vendor, become his own and operated in discharge of the original cause of action (*c*). If the bill is on a wrong stamp, the vendor may sue for goods sold, without proof of its being dishonoured (*d*).

Sale of fixtures.

An action for goods sold and delivered will not lie for fixtures (*e*); because, before they are severed from the freehold, they can be considered goods and chattels for special purposes only (*f*).

(*z*) See *per Littledale*, J., 2 B. & Adol. 435.

(*a*) *Owenson* v. *Morse*, 7 T. R. 64; *Hickling* v. *Hardey*, 7 Taunt. 312; see *Payment*, post.

(*b*) *Burden* v. *Halton*, 4 Bingh. 455; *Champion* v. *Terry*, 3 B. & B. 295.

(*c*) *Camidge* v. *Allenby*, 6 B. & C. 373.—Post.

(*d*) *Cundy* v. *Marriott*, 1 B. & Ad. 696; *Wilson* v. *Vysar*, 4 Taunt. 288.

(*e*) *Lee* v. *Risdon*, 7 Taunt. 188; S. C. 2 Marsh. 495; *Nutt* v. *Butler*, 5 Esp. 176; Amos. & Fer. Fixtures, p. 251; 2 Wms'. Saund. 259 b, note (*e*).

(*f*) Per *Parke*, B., 1 Cr. Mees. & R. 275; *Glover* v. *Coles*, 1 Bingh. 6; *Poole's* case, 1 Salk. 368; *Pitt* v. *Adams*, cited 2 Stark. Ev. 877; *Pitt* v. *Shew*, 4 B. & A. 206.

Nor does the action lie to recover the value of growing crops (*g*), or of standing trees (*h*), which relate to an interest in land. Nor for the value of materials which the plaintiff has employed in building defendant's house (*i*). But if the fixtures are severed from the freehold (*k*), the action may be maintained: so, if the trees are felled (*l*), or the crops have arrived at maturity (*m*). Sale of fixtures, &c.

II. PROOF OF DELIVERY.

In order to support an action for goods sold and delivered, the vendor must give evidence of a delivery of the goods, or, what is equivalent to delivery, that he has done every thing to enable the purchaser to remove the goods (*n*); therefore, where the omission on the part of the plaintiff of some act, although not a condition precedent, prevented the defendant from taking possession of the goods, it was held that the plaintiff could not recover (*o*). If the delivery of the goods, however, Delivery.

(*g*) *Waddington* v. *Bristow*, 2 B. & P. 452. Supra, p. 54.

(*h*) See *Knowles* v. *Michel*, 13 East, 249. Supra, p. 56.

(*i*) *Cotterell* v. *Apsey*, 6 Taunt 322.

(*k*) *Pitt* v. *Shew*, 4 B. & A. 206; *Hallen* v. *Runder*, 1 Cr, Mees. & R. 274, et seq.; see judgment of *Parke*, B.

(*l*) *Smith* v. *Surman*, 9 B. & C. 561, 568; *Bragg* v. *Cole*, 6 B. Moore, 114.

(*m*) *Parker* v. *Staniland*, 11 East, 362; *Warwick* v. *Bruce*, 2 M. & S. 205. Supra.

(*n*) *Smith* v. *Chance*, 2 B. & A. 753.

(*o*) Id.

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has actually taken place, and the property has vested in the vendee, it is no defence to an action for the price that the vendor has been guilty of trespass in forcibly retaking the goods; for, although he may be liable to an action for the tort, it will not work a rescission of the contract (*p*).

When sufficient.

It seems that, to support this action, there must be a more complete delivery and acceptance than is necessary to satisfy the Statute of Frauds (*q*); thus it was decided, that the payment of a sum of money by the buyer by way of earnest, while the goods still remain on the premises of the seller, and the latter declares that they shall not be removed until paid for, does not pass the property to the buyer so as to enable the seller to sue for goods sold (*r*). This decision was confirmed in a recent case. Goods were sold on *ready money terms*, and were left packed up in boxes in plaintiff's house, to be paid for and removed by defendant; in an action for goods sold and delivered, the plaintiff was nonsuited on the ground that no sufficient delivery had been proved (*s*). The ground of the decision in both cases is the same, namely, that something remained to be done by the purchaser before he was at liberty to remove

(*p*) *Stephen* v. *Wilkinson*, 2 B. & Ad. 320; *Groning* v. *Mendham*, 2 Stark. N. P. C. 299, 302.

(*q*) See the observations of *Bayley*, B., 3 Tyrwh. 268, 269.

(*r*) *Goodall* v. *Skelton*, 1 H. Bl. 316.

(*s*) *Boulter* v. *Arnott*, 3 Tyrwh. 267; S. C. 1 Cr. & Mees. 333.

the goods: for, in the former case, by the express terms, they were not to be taken away until paid for; and in the latter case this condition was implied from plaintiff's refusal to sell on credit. It seems, therefore, to be a general rule, that, unless the vendee has either the actual or constructive possession, or *an unconditional power of obtaining possession immediately*, the action for goods sold and delivered cannot be supported (*t*). Delivery.

On the same principle, where anything was to be done *on the part of the vendor* before the goods were to be delivered, until that is done this action cannot be supported (*u*). Thus, where the defendant contracted for the purchase of several Not complete where something to be done.

(*t*) The action in such case ought to be for goods bargained and sold; (see per Lord *Lyndhurst*, C. B., 3 Tyrwh. 269. Supra, p. 241). The distinction is of greater importance since the new Rules of Pleading (Rules Hil. T. 4 Will. IV.); because formerly, in all cases of doubt, both counts might be inserted, and usually were, but now clearly one would be struck out upon application. See above, p. 210.

(*u*) Nor even an action for goods bargained and sold; see above, p. 242. It appears, then, that this general rule may be collected:—Assumpsit for goods *sold and delivered* cannot be maintained as long as anything, on the part either of the vendor or of the purchaser, remains to be done prior to actual delivery. And the circumstances, that would support this action by the vendor, would support trover by the vendee, (see TROVER BY VENDEE, Part 2, Chap. ii.) that is, both the right of property and the right of possession vested in the latter. But assumpsit for goods *bargained and sold* may be supported, as soon as the *vendor* has done everything which he ought to do; because he cannot help the *vendee's* omission, and although such omission may be sufficient to prevent such a *delivery* as is necessary to support an action for goods sold and delivered, it is not sufficient to prevent

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bales of skins, and it was the duty of the seller to count the number in each bale, it was held, that the property was not changed before such enumeration had taken place, and that the goods remained at the seller's risk(*x*). So, where a quantity of bark was sold at a certain price per ton, and part was weighed and delivered, it was held that, even if the residue had vested in the purchaser, an action for goods sold could not be maintained for the latter portion until the weighing was completed(*y*). So, where the goods are in the custody of a warehouseman or other bailee, although in general the sale is complete by the vendor giving a delivery-order to the purchaser(*z*), yet if any act is previously to be done, the property does not pass until performance thereof, so as to enable the vendor to sue for goods sold; as, where the quantity to be delivered is yet to be ascertained by measuring or weighing(*a*).

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such a *change of property* as will support an action for goods bargained and sold.

It may be observed, that the question does not turn upon the act, which remains to be done, being a *condition precedent* to the plaintiff's right of action: the question merely is, whether the act be necessary to be done, before a constructive delivery, or a change of property, can be inferred.

(*x*) *Zagury* v. *Furnell*, 2 Campb. 240.

(*y*) *Simmons* v. *Swift*, 5 B. & C. 857; *Rugg* v. *Minett*, 11 East, 210.

(*z*) See next page.

(*a*) *Busk* v. *Davis*, 2 M. & S. 397; S. C. 1 Marsh. 258, n.; *Hanson* v. *Meyer*, 6 East, 614. See *Ogle* v. *Atkinson*, 1 Marsh. 323; S. C. 5 Taunt. 759; *Wallace* v. *Breeds*, 15 East, 522.

Delivery. Constructive or symbolical.

A constructive, or symbolical, delivery of the goods is sufficient to change the property, as much as the actual transfer of possession; as, by the giving of a halfpenny to the purchaser, where the goods are bulky, and not easily capable of removal(*b*); or, by the delivery to, and acceptance by, the purchaser, of part of the goods sold(*c*). On the same principle, the delivery of the grand bill of sale transfers the property in a ship at sea(*d*); and the indorsement of the bill of lading vests the property in the cargo in the indorsee(*e*). So, the property in goods may be transferred, by the indorsement or delivery of West India Dock warrants(*f*); or, of London Dock warrants(*g*); or, of delivery orders, and transfer tickets in general(*h*), where the goods are in the custody of a warehouseman, or wharfinger: and, if any accident afterwards happens to the goods, it is at the

(*b*) *Manton* v. *Moore*, 7 T. R. 67.

(*c*) *Hinde* v. *Whitehouse*, 7 East, 558; supra, p. 58.

(*d*) *Atkinson* v. *Maling*, 2 T. R. 462.

(*e*) *Wright* v. *Campbell*, 4 Burr. 2046; *Evans* v. *Martlett*, 1 Ld. Raym, 271. See above, p. 194, and post. If the consignee indorses the bill of lading over, although he had no intention of accepting the consignment, such indorsement makes him liable to the vendor for the price; *Corlett* v. *Gordon*, 3 Campb. 472.

(*f*) *Spear* v. *Travers*, 4 Campb. 251; *Lucas* v. *Dorrien*, 7 Taunt. 278; S. C. 1 B. Moore, 29. Supra.

(*g*) *Davenport*, ex parte, 1 Deac. & Chit. 397. See *Wilkinson* v. *Reay*, Dan. & Lloyd, Merc. Ca. 202.

(*h*) *Tucker* v. *Ruston*, 2 C. & P. 86; *Ridout* v. *Alder*, 1 Mont. 103. *Per Mansfield*, C. J., *Elmore* v. *Stone*, 1 Taunt. 460.

Delivery. risk of the purchaser(*i*). So, the goods may continue, by the agreement of the parties, on the premises of the seller, and yet be in law delivered into the purchaser's possession, and remain at his risk, so as to enable the plaintiff to sue for goods sold(*k*); as, where warehouse-rent is paid by the purchaser(*l*); or, where from any other stipulation it may be presumed that the parties contemplated an immediate and not a future sale. So, it is laid down in Blackstone(*m*), that, "by a regular sale, without delivery, the property is so absolutely vested in the vendee, that if A. sells a horse to B. for £10, and B. pays him earnest, or signs a note in writing of the bargain; and afterwards, before the delivery of the horse, or money paid, the horse dies in the vendor's custody; still he is entitled to the money, because, by the contract, the property was in the vendee."

Delivery to agent. Proof of delivery of the goods to an authorized

(*i*) *Greaves* v. *Hepke*, 2 B. & A. 131. By recovering the value of the goods in an action against the ship-owner or other bailee, or even by bringing such an action as trover which presupposes a transfer of the property and right of possession, the vendee affirms the delivery to himself, and cannot afterwards dispute it in an action by the vendor for the price; *Groning* v. *Mendham*, 2 Stark. N. P. C. 299; (and the Court afterwards refused a rule, ib. 302).

(*k*) *Phillimore* v. *Barry*, 1 Camp. 513; *Tarling* v. *Baxter*, 6 B. & C. 360. See *Knight* v. *Hopper*, Skinn. 647.

(*l*) *Hurry* v. *Mangles*, 1 Campb. 452.—Post. See 6 B. & C. 364.

(*m*) 2 Comm. p. 448; Noy's Max. c. 42.

agent, or to any third party in the character of agent at the request of the defendant, is equivalent to delivery to the defendant himself, and will support an averment of a delivery to the latter (*n*): and an acknowledgement by the agent, that he has received the goods, is evidence to charge the principal (*o*). The authority by the defendant may be implied, to enable the third party, as agent, to receive the goods (*p*); as, in the case of delivery of necessaries to a wife, which in general makes the husband liable (*q*); or, in the case of delivery of goods to a bankrupt carrying on the business for the benefit of the creditors, and with the sanction of the assignees, which makes the latter liable for the price (*r*). And a subsequent ratification of the authority is equivalent to previous assent (*s*). Delivery.

A private agreement between the principal and the agent, that the latter only shall be liable, can never affect the seller without notice (*t*); thus, where the agent had undertaken to provide for his Private arrangement between principal and agent ineffective.

(*n*) *Per Curiam, Bull* v. *Sibbs*, 8 T. R. 328; Paley, Pr. & A. 293.

(*o*) *Biggs* v. *Lawrence*, 3 T. R. 454.

(*p*) *Kirby* v. *Bannister*, 5 B. & Ad. 1069; *Davies* v. *Halton*, 5 C. & P. 69. See *Pickering* v. *Busk*, 15 East, 38.

(*q*) *Etherington* v. *Parrott*, 1 Salk. 118. See above, pp. 26, 27, *et seq.*

(*r*) *Kinder* v. *Howarth*, 2 Stark. N. P. C. 354. See *Brewer* v. *Sparrow*, 7 B. & C. 310.

(*s*) See *Maclean* v. *Dunn*, 4 Bing. 722; *Soames* v. *Spencer*, 1 D. & R. 32.

(*t*) *Rich* v. *Coe*, Cowp. 636.

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principal certain articles, which were not to exceed a certain price, the principal was still held liable, as the plaintiff had no notice of the agreement(*u*). So, if the purchaser has given money to his broker to pay for the goods, and the money is not so applied, the purchaser is not discharged, unless the vendor does something from which his assent may be implied to the release of the principal(*x*); such as giving credit to the broker. On the same principle, the purchaser cannot set-off against the claim for the value of the goods any balance which may be due to him from his broker(*y*). If, indeed, the credit was in fact given to the agent alone, the vendor has no claim except against the agent(*z*). However, even where the agent has been debited with the price, if the vendor was ignorant of the principal at the time, he may elect, upon discovering the latter, to hold him liable(*a*). And it is not sufficient to defeat the vendor's right of election that he was aware that the party dealing with him was an agent, unless he also knew who the principal was; for otherwise he could not exercise

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(*u*) *Precious* v. *Abel*, 1 Esp. 350; *Rimell* v. *Sampayo*, 1 C. & P. 254.

(*x*) *Powel* v. *Nelson*, cited 15 East, 65; *Kymer* v. *Suwercropp*, 1 Campb. 109; *Speering* v. *Degrave*, 2 Vern. 643.

(*y*) *Waring* v. *Favenc*, 1 Campb. 85.

(*z*) *Bramah* v. *Ld. Abingdon*, cited 15 East, 66.

(*a*) *Nelson* v. *Powell*, 3 Dougl. 410; *Railton* v. *Hodgson*, 4 Taunt. 576, n.; *Peale* v. *Hodgson*, ibid.

the right(*b*). But if the vendor, after the real principal is disclosed, elects to make the broker his debtor, he will not be allowed afterwards to turn round and charge the principal(*c*). Delivery.

The delivery of goods to a servant will not make the master liable, unless there is proof of express or implied authority given by the latter(*d*). Even where the master has commissioned his servant to buy, but has at the same time given him money to pay the price, he will not be liable, if the servant embezzle the money instead of applying it in payment; for the tradesman in such case sells at his own risk(*e*). But, where the master has once given authority to his servant to buy on credit, he will be liable for his subsequent contracts(*f*). Nor is this liability discharged even if, in such subsequent cases, the master has Delivery to servant.

(*b*) *Thomson* v. *Davenport*, 9 B. & C. 78; S. C. Dan. & Lloyd, Merc. Ca. 278.

(*c*) *Patterson* v. *Gandassequi*, 15 East, 62; *Addison* v. *Gandassequi*, 4 Taunt. 574.

(*d*) *Pearce* v. *Rogers*, 3 Esp. 214; *Maunder* v. *Conyers*, 2 Stark. N. P. C. 281; *Boulton* v. *Arlsden*, 3 Salk. 234; *Boulton* v. *Hillersden*, 1 Ld. Raym. 224; *Anon.*, 1 Show. 95.

(*e*) *Stubbing* v. *Heintz*, Peake, 47; *Southby* v. *Wiseman*, 3 Keble, 625.

(*f*) *Hazard* v. *Treadwell*, 1 Str. 506; *Rusby* v. *Scarlett*, 5 Esp. 76; *Todd* v. *Robinson*, Ry. & Moo. 217; *Gilman* v. *Robinson*, *id.* 226. See *Barber* v. *Gingell*, 3 Esp. 60; *Haughton* v. *Ewbank*, 4 Campb. 88; *Watkins* v. *Vince*, 2 Stark. N. P. C. 368; *Miller* v. *Hamilton*, 5 C. & P. 433.

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supplied money to the servant to pay for the goods, unless he has also given notice to the tradesman: for the seller will not be affected by private transactions between the master and servant(*g*).

Delivery to carrier.

Where the purchaser has appointed a particular carrier to receive the goods, a delivery to the carrier will be sufficient to support the action (*h*); and, as the property vests in the purchaser immediately upon such delivery, the goods thenceforth remain at the risk of the vendor, and he may maintain an action for the price, although the goods should be subsequently lost or destroyed before they arrive in the purchaser's possession (*i*). Even if the purchaser has not named a particular carrier, the appointment may be presumed; as, where he has given a general order that they should be sent by some carrier (*k*); or, even where he has given no directions whatever about the carriage, provided that he has been accustomed to receive goods

Implied appointment.

(*g*) *Wayland's* case, 3 Salk. 234; S. C. 1 Ld. Raym. 225; *Rusby* v. *Scarlett*, 5 Esp. 76; *Nickson* v. *Brohan*, 10 Mod. 109, 111; *Rimell* v. *Sampayo*, 1 C. & P. 254; *Precious* v. *Abel*, 1 Esp. 350; *Greatland* v. *Freeman*, 3 Esp. 85; Paley, Pr. & A. 170.

(*h*) *Vale* v. *Bayle*, Cowp. 294; *Groning* v. *Mendham*, 5 M. & S. 189; *Fragano* v. *Long*, 4 B. & C. 219; S. C. 6 D. & R. 233; *Haynes* v. *Wood*, Bull. N. P. 36; Selw. N. P. 1370, (8th Ed.).

(*i*) *Alexander* v. *Gardner*, 1 Bingh. N. S. 671. See *Griffin* v. *Langfield*, 3 Campb. 254; *Honeywood* v. *Stone*, 2 Chit. Rep. 142.

(*k*) *Dutton* v. *Solomonson*, 3 B. & P. 582, 584; *Copeland* v. *Lewis*, 2 Stark. N. P. C. 33; *Godfrey* v. *Furzo*, 3 P. Wms. 186.

from the plaintiff by the same mode of conveyance (*l*). And it is immaterial whether the carrier was to be paid by the vendor or not (*m*). But if the carrier was, in fact, in the situation of the *vendor's* agent, a delivery to him is not sufficient to charge the purchaser, unless the goods are afterwards delivered safely into the custody of the latter (*n*). Delivery.

Where the purchaser has given a general order that the goods should be sent by a carrier, reasonable compliance on the part of the vendor is sufficient; as, where the vendor, intending to forward the goods by the earliest vessel, sent advices to the purchaser to that effect, but afterwards finding that the vessel was fully laden, sent them by the next (*o*). However, in general, it is the vendor's duty to adhere as strictly as possible to the terms of the order given by the consignee; therefore, where the latter expected that the consignment would be shipped direct from the port at which the consignor carried on his trade as a merchant, and which was the usual shipping port, but the consignment was in fact sent overland to another port, and shipped there, it was held that the liability of the consignor was not discharged until the shipment at the latter port (*p*). And in all General direction.

(*l*) *Hart* v. *Sattley*, 3 Campb. 528.
(*m*) *King* v. *Meredith*, 2 Campb. 639.
(*n*) *Gingell* v. *Glasscock*, 8 Bingh. 86.
(*o*) *Cooke* v. *Ludlow*, 2 N. R. 119.
(*p*) *Ullock* v. *Reddelein*, Dan. & Lloyd, Merc. Ca. 6.

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cases where the goods are directed to be sent by a carrier, it is the vendor's implied duty to do everything necessary to secure the carrier's responsibility: therefore, if the goods have never reached the defendant, and if, through the omission of the plaintiff the defendant is deprived of his remedy over against the carrier, the plaintiff cannot recover the price (*q*). But the vendor may be excused from performing what otherwise would have been his duty, if the omission is warranted by the course of dealing between the parties (*r*). It may be observed that some recent cases seem to decide, at least in reference to the Statute of Frauds, that there must be a more unequivocal assent, on the part of the purchaser, than the older cases required, to make the delivery to a carrier operate as a delivery to, and acceptance by, the purchaser himself (*s*).

III. AMOUNT OF DAMAGES.

Damages.

The vendor must give some proof of the value of the goods, and the damages he has sustained (*t*). Where the *quantum* of damages, in an action for

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(*q*) *Clarke* v. *Hutchins*, 14 East, 475. In the case of *Cothay* v. *Tute*, reported 3 Campb. 129, decided at Nisi Prius within a month after *Clarke* v. *Hutchins*, Lord Ellenborough appears to have ruled directly contrary to his judgment in the latter case. *Qu.?*

(*r*) *Goom* v. *Jackson*, 5 Esp. 112.

(*s*) *Anderson* v. *Hodgson*, 5 Price, 630; *Acebal* v. *Levy*, 10 Bingh. 376. Supra, p. 64.

(*t*) *Hodder* v. *Saunders*, 2 Show. 86.

goods sold, depends on the construction of a mercantile instrument, it is a question for the consideration of the jury; as, whether discount is payable on the whole purchase-money, or on that sum *minus* the duty (*u*); or, whether freight is chargeable on the net weight of goods as ascertained at the king's landing scales, or according to the weights expressed in the bill of lading (*x*). Damages.

In computing the amount which the vendor is entitled to recover, the whole of the original contract must be resorted to; thus, where it was agreed that the vendee should pay one-fifth, and that the plaintiff should look to the correspondents abroad (to whom the goods had been consigned for resale), for payment of the residue, it was held that the vendee was liable for the difference on the loss arising from the resale of the remaining four-fifths (*y*).

Of evidence of bad quality in reduction of damages.

It is frequently an important consideration, in what cases the defendant, in an action for goods sold, may give evidence of the bad quality of the goods in reduction of damages. This may be considered in three different cases:—1. Where there has been no stipulated price.—2. Where there has Evidence of bad quality.

(*u*) *Smith* v. *Blandy*, Ry. & Moo. 260. See *Haig* v. *Napier*, 1 Dow, 255.

(*x*) *Geraldes* v. *Donison*, Holt, N. P. C. 346.

(*y*) *Hoffman* v. *Heyman*, 1 B. & C. 7; S. C. 2 D. & R. 74.

Damages. been a stipulated price, and also a warranty, or a special contract as to quality.—3. Where there has been a stipulated price, and no warranty or contract as to quality.

On *quantum meruit.* 1. Where there has been no stipulated price, and the plaintiff sues on the *quantum meruit* only, he must give express evidence of the value, and the purchaser will be at liberty to give in evidence any circumstance tending to show that they were of less value than that contended for, or even that they were of no value at all(*z*). If the plaintiff gives proof of delivery merely, and none of value, it will be presumed that the goods furnished were the least valuable commodity in which he dealt(*a*). But if he gives evidence of the apparent value at the time of sale, and no fraud can be proved, he will be entitled to recover according to such value, although the article at the time of the trial may turn out worthless(*b*). As the plaintiff, by relying on the quantum valebant, affords the defendant an opportunity of alleging any circumstance in mitigation, he must be prepared to meet such proof;

(*z*) See Rosc. Ev. 219.

(*a*) *Clunnes* v. *Pezzy*, 1 Campb. 8. Because the presumption in such case is in favour of the defendant, and the *onus* of proof, therefore, on the plaintiff: but, where the presumption is in favour of the plaintiff, the measure of damages would be according to the *most* valuable commodity; *Armory* v. *Delamorie*, 1 Stra. 505. See 1 Campb. 8, n.

(*b*) *Bluett* v. *Osborne*, 1 Stark. N. P. C. 384.

and, therefore, if the defendant can show that the article was utterly unserviceable and valueless, the plaintiff cannot recover (*c*). Damages.

2. Where there has been a stipulated price, and also a warranty, or a special contract as to the quality of the goods, it is still open to the defendant to reduce the damages by showing that the quality is not conformable to the contract; for the specific sum is to be given only for the specific quality, and if the plaintiff has not performed what he engaged to do, he cannot call for performance on the part of the defendant. This is now fully decided (*d*); although it was formerly held, that, even where there was an express warranty not complied with, it was no defence to an action for the stipulated price, but that the defendant's remedy was by a cross action (*e*). The breach of Where stipulated price, and contract as to quality.

(*c*) *Basten* v. *Butter*, 7 East, 479; *Duffit* v. *James*, cited 7 East, 480; *Farnsworth* v. *Garrard*, 1 Campb. 38.

(*d*) *Street* v. *Blay*, 2 B. & Adol. 464; *Allen* v. *Cameron*, 3 Tyrwh. 907; S. C. 1 Cr. & Mees. 832; *Chapel* v. *Hickes*, 2 Cr. & M. 214; S. C. 4 Tyrwh. 43; *King* v. *Boston*, cited 7 East, 481, n. See the observations and judgment of the Court in *Basten* v. *Butter*, 7 East, 479 *et seq.* See *Thornton* v. *Place*, 1 M. & Rob. 218.

(*e*) *Broom* v. *Davis*, cited 7 East, 480, n.; *Cormack* v. *Gillies*, ib. 481; *Morgan* v. *Richardson*, ib. 482, n. It may be observed that the question is not affected by the subject of *conditions precedent*; because, although the breach of warranty might have been pleaded in bar to an action *for not accepting*, on the ground of the vendor's non-performance, yet, by accepting the goods, the defendant waives the condition. *Vid. supra*, p. 230, 235.

Damages.

warranty cannot, indeed, be pleaded *in bar* of the action brought by the vendor for the price; because, after the contract has been executed, and the vendee has accepted the goods, it is not competent for him to rescind it of his own accord, though the vendor have been guilty of a breach of undertaking (*f*). But "the cases have established, that the breach of the warranty may be given in evidence in mitigation of damages, on the principle, as it should seem, of avoiding circuity of action; and there is no hardship in such a defence being allowed, as the plaintiff ought to be prepared to prove a compliance with his warranty, which is part of the consideration for the specific price agreed by the defendant to be paid" (*g*). Thus, where an order has been given by the defendant, the plaintiff cannot recover the stipulated price without proof that the goods supplied were conformable to such order (*h*). So, where the goods are sold by sample (*i*), or where there has been a representation on the part of the vendor, or any

(*f*) *Street* v. *Blay*, 2 B. & Ad. 456. Especially if the vendee has exercised acts of ownership, such as parting with the property by a resale of the chattel; *id.* See below, Part 2, Chap. iii.

(*g*) *Per* Lord *Tenterden*, C. J., delivering the judgment of the Court, 2 B. & Ad. 462, 463. And see id. 464.

(*h*) *Hayden* v. *Hayward*, 1 Campb. 180; *Sinclair* v. *Bowles*, 9 B. & C. 92; *Ellis* v. *Hamlen*, 3 Taunt. 52; *Townsend* v. *Neale*, 2 Campb. 190; *Duncan* v. *Blundell*, 3 Stark. N. P. C. 6.

(*i*) *Germaine* v. *Burton*, 3 Stark. N. P. C. 32.

express warranty of the quality (*k*), he must prove that the goods accord therewith. If an article made to order is constructed of more costly materials than the purchaser contracted for, he is not bound either to pay a higher price than that stipulated, or to return the article (*l*). Damages.

However, even in the case of a special contract of quality, the vendee ought to object within a reasonable time, if he means to dispute the value of the goods; for if he keeps them for a longer time than is necessary to ascertain their quality, so that the value can no longer be truly estimated, he will be held to have acquiesced, and will be compelled to pay the full price (*m*). Thus, where a quantity of rice had been sold by sample, and the vendee, after discovering its inferiority, set it up for resale in hopes of making a profit, but, there being no bidders, bought it in himself, it was held Vendee must object in reasonable time.

(*k*) *Poulton* v. *Latimore*, 9 B. & C. 259; *Liddard* v. *Kain*, 2 Bingh. 183; *Lomi* v. *Tucker*, 4 C. & P. 15; *Parmeter* v. *Burrell*, 3 C. & P. 144; *Lewis* v. *Cosgrave*, 2 Taunt. 2.

(*l*) *Wilmot* v. *Smith*, 3 C. & P. 453.

(*m*) *Milner* v. *Tucker*, 1 C. & P. 15; *Percival* v. *Blake*, 2 C. & P. 514; *Cash* v. *Giles*, 3 C. & P. 407; *Cutler* v. *Close*, 5 C. & P. 337, 339; *Grimaldi* v. *White*, 4 Esp. 95; *Groning* v. *Mendham*, 1 Stark. N. P. C. 257; *Fisher* v. *Samuda*, 1 Campb. 190; *Prosser* v. *Hooper*, 1 B. Moore, 106; *Burn* v. *Miller*, 4 Taunt. 745; *Yeats* v. *Pim*, 2 Marsh. 141; S. C. 6 Taunt. 446. Even where there has been actual fraud, the vendee will be precluded by acquiescence after detecting the fraud; *Campbell* v. *Fleming*, 1 Ad. & Ell. 40. Supra, p. 133.

Damages.

that he had precluded himself from objecting to the quality (*n*). So, where barilla was sold, warranted to be of the best quality for making soap, and the vendee complained of its bad quality, but employed it in eight successive boilings, he was held liable for the full price (*o*). The ground of the decision, however, in the last case, was not merely the acquiescence presumed from lapse of time, but that the defendant had by his own act prevented the possibility of ascertaining the true value; for, it is decided that, where there has been an express warranty, the vendee, even after exercising any act of ownership, (such as resale of the chattel,) and deriving pecuniary benefit therefrom, will nevertheless be always entitled to have the damages reduced, *as long as he would be entitled to damages in a cross action against the vendor* (*p*).

Reasonable time allowed.

A reasonable time will always be allowed to the vendee for due trial of the commodity purchased (*q*); for, it may sometimes happen that the

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(*n*) *Parker* v. *Palmer*, 4 B. & A. 387.

(*o*) *Hopkins* v. *Appleby*, 1 Stark. N. P. C. 477.

(*p*) *Street* v. *Blay*, 2 B. & Adol. 464, *per* Lord *Tenterden*, C. J.; *De Sewhanberg* v. *Buchanan*, 5 C. & P. 343. However, the exercising acts of ownership, and appearing to acquiesce in the contract, will render the proof on the part of the vendee more difficult, and may raise a presumption that the article was such as he intended to purchase; See *Prosser* v. *Hooper*, 1 B. Moore, 106.—Post, OF WARRANTY.

(*q*) *Okell* v. *Smith*, 1 Stark. N. P. C. 107.

quality cannot be ascertained by immediate tests, as in the case of seeds for growing (*r*). Damages.

Again, where the contract is to deliver a certain specified quantity, the purchaser will be liable for whatever portion is delivered, provided he elects to retain it, instead of rescinding the contract on the ground of the non-delivery of the whole quantity (*s*). Certainly, where a specific quantity is to be delivered by a certain time, the vendor cannot maintain an action for part until that time has expired; because, until then, the vendee has the option of returning the part delivered (*t*). But if he does not so return it, he will become liable for so much, because he will not be allowed to adopt the contract in part by retaining the goods, and renounce it in part by refusing to pay the stipulated value (*u*). So, where the defendant has contracted for a certain As to quantity of goods supplied.

(*r*) *Poulton* v. *Lattimore*, 9 B. & C. 259; "which seems to shake *Groning* v. *Mendham*, 1 Stark. N. P. C. 257," *per Bayley*, B., 3 Tyrwh. 911.

(*s*) *Oxendale* v. *Wetherell*, 9 B. & C. 386; *Bragg* v. *Cole*, 6 B. Moore, 114; *Shipton* v. *Casson*, 5 B. & C. 378; *Champion* v. *Short*, 1 Campb. 53. Unless the express agreement were that plaintiff was not entitled to any thing unless he performed the *entire* contract; *Bates* v. *Hudson*, 6 D. & R. 3; *Sinclair* v. *Bowles*, 9 B. & C. 92.

(*t*) *Waddington* v. *Oliver*, 2 N. R. 61; *Walker* v. *Dixon*, 2 Stark. N. P. C. 281.

(*u*) See the judgment of the court, *Oxendale* v. *Wetherell*, 9 B. & C. 387, 388.—Supra.

Damages.

quantity, he is not bound to accept more (*x*); but, if he acquiesces in such additional quantity, he will be bound (*y*). It seems the value of additional goods, work, &c., would be measured, not according to the special contract relating to the rest, but according to a reasonable rate of charge (*z*).

When a bill or note has been given.

Where a promissory note or bill of exchange has been given in payment by the vendee, he cannot give in evidence, either by way of defence to an action on the instrument or in reduction of damages, the bad quality of the goods, or the unreasonableness of the price, or even non-compliance with an express warranty; but must have recourse to a cross action (*a*). Yet if he can establish fraud, it would defeat the contract altogether (*b*).

(*x*) *Cross* v. *Eglin*, 2 B. & Ad. 106.

(*y*) *Robson* v. *Godfrey*, Holt, N. P. C. 236; S. C. 1 Stark. N. P. C. 275; *Lovelock* v. *King*, 1 M. & Rob. 60.

(*z*) *Pepper* v *Burland*, Peake, 103; *per* Lord *Kenyon*, C. J.

(*a*) *Knox* v *Whalley*, 1 Esp. 159; *Morgan* v. *Richardson*, 1 Campb. 40, n.; *Tye* v. *Gwynne*, 2 Campb. 346; *Solomon* v. *Turner*, 1 Stark. N. P. C. 51; *Obbard* v. *Betham*, M. & Malk. 483; S. C. Lloyd & Welsby, Merc. Ca. 180. Because, although a *total want* of consideration may be shown in answer to an action on the instrument, a *partial failure* of consideration is no defence; see Bayl. Bills, 395, (4th Ed.). See the plea put on the record in *Low* v. *Burrows*, 2 Ad. & Ell. 483:—as to part, that the consideration was the sale of a chattel, with a warranty, which warranty had been broken; as to the residue, no consideration:—both parts of which would have been clearly bad, the former on general, and the latter on special, demurrer.

(*b*) *Solomon* v. *Turner*, 1 Stark. N. P. C. 51; *Fleming* v. *Simpson*, 1 Campb. 40, n.; *Lewis* v. *Cosgrave*, 2 Taunt. 2.

Damages. Where stipulated price only.

8. Where there has been a stipulated price, and no warranty or special agreement as to quality, it seems to be doubtful whether the inferiority in quality or the utter worthlessness of the goods can be given in evidence in mitigation of damages. The question does not appear to have arisen; but, by analogy to the case of *Street* v. *Blay* (*d*), it would seem that at all events the defendant should be at liberty to give evidence of bad quality in reduction of damages, wherever he would be entitled to recover in a cross action on an *implied* warranty (*e*).

Of Payment.

Payment.

Under the head of *quantum* of damages, it may be considered what is a sufficient payment to discharge the purchaser. As a defence in bar of the action, payment must be specially pleaded by the new rules (*f*); yet evidence of payment has been admitted in reduction of the damages, although not pleaded specially (*g*).

According to contract.

Payment made according to the mode stipulated at the time of the sale will be sufficient; and even if such mode of payment was illegal, it does not lie in the plaintiff's mouth to take advantage of

(*d*) 2 B. & Ad. 456, 464. Supra, p. 270.

(*e*) See below, Part 2, Chap. iii. as to implied warranty.

(*f*) Rules Hil. T. 4 Will. IV. See below.

(*g*) *Shirley* v. *Jacobs*, 2 Bingh. N. S. 88; *Cozens* v. *Padden*, Exch. Trin. T. 1835, cited ib. 89.

Payment.

it (*h*). So if the vendor has directed the purchaser to remit the money in a particular manner, compliance with such direction will discharge the purchaser, though the money be lost (*i*), unless due caution has not been used (*k*). So, a transfer to the account of the plaintiff made, according to agreement, in the books of the mutual banker of the parties, will amount to payment, though the banker become bankrupt before any money actually passes, or even before notice of the transfer having been made reaches the plaintiff, the latter having previously given his assent (*l*). The vendor is bound by the terms of the contract, which he has authorized the vendee's broker to communicate to his principal; therefore payment according to such terms will discharge the latter (*m*).

By bill or note.

Payment by a bill of exchange or promissory note is *primâ facie* evidence of payment for the goods sold; and it is for the plaintiff to show that the security has been dishonoured (*n*). However,

(*h*) *Alexander* v. *Owen*, 1 T. R. 225.

(*i*) *Warwick* v. *Noakes*, Peake, 67.

(*k*) *Hawkins* v. *Rutt*, Peake, 186.

(*l*) *Eyles* v. *Ellis*, 4 Bingh. 112; S. C. 12 B. Moore, 306. See *Bolton* v. *Richard*, 6 T. R. 139. And see *Bodenham* v. *Purchas*, 2 B. & A. 39.

(*m*) *Horsfall* v. *Fauntleroy*, 10 B. & C. 755; S. C. Lloyd & Welsby, Merc. Ca. 340.

(*n*) *Stedman* v. *Gooch*, 1 Esp. 5; *Hebden* v. *Hartsink*, 4 Esp. 46; *Kearslake* v. *Morgan*, 5 T. R. 513; *Richardson* v. *Rickman*, cited id. 517; *Tapley* v. *Martens*, 8 T. R. 451. See *Bunney* v. *Poyntz*, 4 B. & Ad. 568, 573.

in general, unless the vendor has agreed to run the risk of the bill or note which he takes in payment being bad, if the instrument is dishonoured, it will not be considered payment (*o*); provided that the vendor has not by *laches* made it his own, in which case it would operate in discharge of the original cause of action (*p*). Therefore, the plaintiff may sue upon the original consideration, where the bills given in payment are not available for want of a stamp (*q*), or otherwise (*r*); or, if at the time of the action brought they remain overdue and unpaid in the vendor's hands (*s*), or the hands of his agent (*t*); or, even where judgment has been recovered on the bill, if the judgment is still un- Payment.

(*o*) *Owenson* v. *Morse*, 7 T. R. 64; *Fry* v. *Hill*, 7 Taunt. 397; *Swinyard* v. *Bowes*, 5 M. & S. 62; *Everett* v. *Collins*, 2 Campb. 515; *Marsh* v. *Pedder*, 4 Campb. 257; *Brown* v. *Kewley*, 2 B. & P. 518; *Hickling* v. *Hardey*, 7 Taunt. 312; *Goodwin* v. *Coates*, 1 M. & Rob. 221; *Robinson* v. *Read*, 9 B. & C. 449. See *Rogers* v. *Langford*, 1 Cr. & Mees. 637. However, if the vendor has parted with the chattel, the dishonour of the bill gives him no lien thereon: and even if the agreement was that he should have a claim upon it until payment, this is but a personal licence available only against the purchaser himself; *Howes* v. *Ball*, 7 B. & C. 481.

(*p*) *Camidge* v. *Allenby*, 6 B. & C. 373; *Alderson* v. *Langdale*, 3 B. & Ad. 660. Chit. Bills, 197; Bayl. Bills, 167.

(*q*) *Brown* v. *Watts*, 1 Taunt. 353; *Wilson* v. *Vysar*, 4 Taunt. 288; *Tyte* v. *Jones*, 1 East, 58, n.

(*r*) *Plimley* v. *Westley*, 2 Bingh. N. S. 249; *Atkinson* v. *Hawdon*, 2 Ad. & Ell. 628.

(*s*) *Burden* v. *Halton*, 4 Bingh. 454.

(*t*) *Hadwen* v. *Mendizabel*, 10 B. Moore, 477; S. C. 2 C. & P. 20.

Payment. satisfied(*u*). So, if the vendor has lost the bill before payment, he may sue upon the original contract of sale(*x*), provided that the purchaser is not liable to a subsequent holder(*y*). So, the purchaser is not discharged by the vendor taking a bill from the agent, which is afterwards dishonoured, though the bill have been renewed without notice(*z*). But if payment in cash has been offered, and the vendor for his own convenience has elected to take a bill(*a*); or, if he voluntarily agrees to run the risk(*b*), even where the purchaser knew at the time that the bill was worthless(*c*), the vendor will not be entitled, upon the dishonour of the instrument, to resort to his demand for goods sold. The debt is in every case suspended (even where it is not discharged) by the acceptance of the security; therefore, until the time on the bill has expired the vendor cannot sue on the original consideration(*d*).

To agent of vendee. Payment by the purchaser to his own agent will

(*u*) *Tarleton* v. *Allhusen*, 2 Ad. & Ell. 32.

(*x*) *Rolt* v. *Watson*, 4 Bingh. 273.

(*y*) *Champion* v. *Terry*, 3 B. & B. 295.

(*z*) *Clarke* v. *Noel*, 3 Campb. 411; *Robinson* v. *Read*, 9 B. & C. 449.

(*a*) *Smith* v. *Ferrand*, 7 B. & C. 19; *Strong* v. *Hart*, 6 B. & C. 160; *Bolton* v. *Richard*, 6 T. R. 139; *Vernon* v. *Boverie*, 2 Show. 296.

(*b*) See *Owenson* v. *Morse*, 7 T. R. 66.

(*c*) *Read* v. *Hutchinson*, 3 Campb. 352.

(*d*) *Simon* v. *Lloyd*, 2 Cr. Mees. & Rosc. 187. See above, p. 249.

not, in general, discharge his liability unless the agent actually pays over the money so received to the vendor(*e*); for the vendor will not be affected by private dealings between the purchaser and his agent, or the state of accounts between them(*f*). So, a direction by the debtor to his banker or other agent holding funds belonging to the debtor, to place to the credit of a creditor a sum of money in payment for goods sold as if a bill had been drawn, will not discharge the debtor, where the agent becomes bankrupt before any payment has in fact been made(*g*). Payment.

Payment to the authorized agent of the vendor is good. And payment to a third party will discharge the purchaser, if such party has been allowed to act so as to induce the belief that he is authorized to receive the price of the goods sold(*h*); as, where an agent entrusted with goods has sold them without disclosing the principal(*i*). To agent of vendor.

(*e*) *Kymer* v. *Suwerkropp*, 1 Campb. 109; *Speering* v. *Degrave*, 2 Vern. 643; *Powel* v. *Nelson*, cited 15 East, 65.

(*f*) *Rich* v. *Coe*, Cowp. 636; *Waring* v. *Favenc*, 1 Campb. 85; *Rimell* v. *Sampayo*, 1 C. & P. 254.—Supra.

(*g*) *Pedder* v. *Watts*, 2 Chit. Rep. 619; Peake, Add. Ca. 41. See *Brown* v. *Kewley*, 2 B. & P. 518.

(*h*) *Barrett* v. *Deere*, M. & Malk. 200; *Thompson* v. *Thompson*, 7 Ves. Jun. 470.

(*i*) *Coates* v. *Lewes*, 1 Campb. 444; *Capel* v. *Thornton*, 3 C. & P. 352; *Townsend* v. *Inglis*, Holt, N. P. C. 278; *Crosser* v. *Miles*, Lofft, 593. See *Hodgson* v. *Anderson*, 3 B. & C. 842; S. C. 5 D. & R. 735. [So, tender to an authorized agent is equivalent to tender to principal; *Goodland* v. *Blewith*, 1 Campb. 477.]

Payment. And in such case, although the principal is at liberty to interfere at any time before payment, so as to make the purchaser liable if he pay over to the agent after the notice(*k*), yet the principal has no power to rescind the *previous* acts of his agent, but is concluded by the terms sanctioned by the latter(*l*). Where a special agent has exceeded his authority as to the mode of taking payment, it will be good if the principal afterwards adopt it(*m*).

Under Factor's Act. The rules of common law, in respect of payments made to agents, are confirmed by the Factor's Act(*n*); the 4th section of which provides, that any person may contract for the purchase of goods with any agent entrusted with the possession of them, or to whom they may be consigned, and pay for the same to the agent, *notwithstanding he may have notice* that the person with whom he contracts is an agent(*o*), if such con-

(*k*) *Scrimshire* v. *Alderton*, 2 Str. 1182; *Mann* v. *Forrester*, 4 Campb. 60; *Pratt* v. *Willey*, 2 C. & P. 350; *Hornby* v. *Lacy*, 6 M. & S. 166. The principal has the same power if the factor acts under a *del credere* commission: "a del credere commission does not alter one iota the right subsisting between vendor and vendee;" *per* Lord *Ellenborough*, C. J., 6 M. & S. 171. And see *post*.

(*l*) *Blackburn* v. *Scholes*, 2 Campb. 343; *Favenc* v. *Bennett*, 11 East, 36.

(*m*) *Howard* v. *Chapman*, 4 C. & P. 508, 510.

(*n*) 6 Geo. IV. c. 94. See Abb. Shipp. p. 382; Paley, Pr. & A. p. 223.

(*o*) See *Campbell* v. *Hassell*, 1 Stark. N. P. C. 233.

tract and payment be made in the usual course of business, and without notice, at the time of the contract or payment, that the agent is not authorized to sell or to receive the price. It has been decided, that a wharfinger (who was also a flour-factor) is not an agent within the meaning of this section (*p*). Lord Tenterden, C. J. observed, "It is difficult to say precisely what is meant in this section by 'an agent entrusted with goods;' but if a wharfinger was so considered, it would be impossible to say that a carter, warehouseman, or packer was not" (*q*). It would seem to be confined to agents for the purposes of sale, and not to extend to mere bailees. Payment.

Of Set-off.

The defendant may reduce the amount of damages claimed by the plaintiff in an action for goods sold, by setting off a debt due from the latter (*r*), provided he has either pleaded, or (where the general issue is pleaded alone) given notice of, such set-off (*s*). And the defendant is not pre- Set-off.

(*p*) *Monk* v. *Whittenbury*, 2 B. & Ad. 484; S. C. 1 M. & Rob. 81.

(*q*) 2 B. & Ad. 486. See 2 Campb. 335.

(*r*) *Dunmore* v. *Taylor*, Peake, 41. See 2 Geo. II. c. 22, s. 13, (made perpetual by 8 Geo. II. c. 24, s. 4).

(*s*) Tidd Pract. 721; *Fothergill* v. *Jones*, 1 C. & P. 133. Where there is a special plea as well as the general issue, the set-off must be pleaded; *Duncan* v. *Grant*, 1 Cr. Mees. & R. 383. It would seem that now, under the New Rules, the defence

Set-off.

cluded from setting off an adverse claim subsequently accruing, although by the express agreement the goods were to be sold on ready-money terms(*t*). But the debt set off must have been due at the time of the action brought, and not merely at the time of the plea pleaded(*u*). The purchaser is entitled to set off a debt due to him from the factor from whom he has bought the goods, where the factor has acted in his own name and represented himself as principal(*x*). Otherwise, if collusion can be proved(*y*). And if the purchaser ascertains at any time before the contract is completed that the party, with whom he is dealing, acts in a representative character only and not as principal, his right of set-off will be barred(*z*). The character of broker differs materially from that of factor: the former has more

In sale by factor.

In sale by broker.

of set-off must always be pleaded. See Rules Hil. T. 4 Will. IV.; *Assumpsit*, 3.

(*t*) *Cornforth* v. *Rivett*, 2 M. & S. 510; *Eland* v. *Carr*, 1 East, 375. See *M'Gillivray* v. *Simpson*, 9 D. & R. 35; S. C. 2 C. & P. 320; *Taylor* v. *Okey*, 13 Ves. Jun. 180; *Lechmere* v. *Hawkins*, 2 Esp. 626.

(*u*) *Braithwaite* v. *Coleman*, 4 Nev. & Man. 654; *Evans* v. *Prosser*, 3 T. R. 186.

(*x*) *Carr* v. *Hinchcliffe*, 4 B. & C. 547; S. C. 7 D. & R. 42; *George* v. *Claggett*, 7 T. R. 359; *Rabone* v. *Williams*, 7 T. R. 360, n.; *Bayley* v. *Morley*, ibid.; *Ross* (or *Stracey*) v. *Decy*, 2 Esp. 469, n., and 7 T. R. 360, n. But the purchaser cannot set off a debt due to him from his own agent; *Waring* v. *Favenc*, 1 Campb. 85.

(*y*) *Escot* v. *Milward*, 7 T. R. 361, n.

(*z*) *Moore* v. *Clementson*, 2 Campb. 24.

limited powers, and if he sells in his own name he acts beyond his authority; therefore, if one buys goods from a broker, who sells in his own name, even without notice, it is at the risk of the buyer, and no right of set-off is acquired against the vendor-principal (*a*). Set-off.

Of Interest.

A question often arises whether interest is recoverable on the price of the goods sold. In general, interest is not allowable in any case where Interest.

(*a*) *Baring* v. *Corrie*, 2 B. & A. 137. The decision proceeded upon the ground that, according to the usual mode in which sales by brokers are effected, the purchaser by using reasonable care and diligence may ascertain in what character the party selling appears. Abbott, C. J., said, "the distinction between a broker and a factor is not merely nominal. A factor is a person to whom goods are consigned for sale by a merchant residing abroad, or at a distance from the place of sale, and he usually sells in his own name without disclosing that of his principal; the latter, therefore, with full knowledge of those circumstances, trusts him with the actual possession of the goods, and gives him authority to sell in his own name. But the broker is in a different situation; he is not trusted with the possession of the goods, and he ought not to sell in his own name. The plaintiffs in this case have only reposed the usual confidence which every merchant must place in his broker, and if the defendants should succeed, it would not be safe for any merchant hereafter to employ a broker." See 2 B. & A. 143, 144. If, however, the principal should so act as to mislead purchasers, by conferring on the broker the indicia of property, and enabling him to hold himself out as principal, the rule would not apply, and the principal would no longer be protected. See the judgment of *Bayley*, J., id. 146, 147.

Interest.

it has not been expressly agreed upon, except on mercantile securities, and except also in particular transactions and under special circumstances by the usage of trade (*b*). In the case of goods sold, greater latitude formerly prevailed, and the Courts have allowed interest where the goods were to have been paid for on a specified day, and default was then made in payment (*c*). But this doctrine is now overruled, and interest clearly is not recoverable under such circumstances (*d*).

Where recoverable.

When bill, &c. was to have been given.

But where goods sold were to have been paid for by a bill or other instrument on which, if given, interest would have run, if such bill is not given, interest is recoverable from the day when it would have become due (*e*). And in such case the interest is considered as part of the estimated value of the

(*b*) See *per Abbott*, C. J., *Higgins* v. *Sargent*, 2 B. & C. 349. And see *Anon.*, 7 Taunt. 244.

(*c*) *Mountford* v. *Willes*, 2 B. & P. 337; *Blaney* v. *Hendrick*, 2 Bl. Rep. 761. It was said to have been so allowed in an old case by *Montagu*, B.; see 15 East, 227.

(*d*) *Gordon* v. *Swan*, 12 East, 419; S. C. 2 Campb. 429, n.; *Pinnock* v. *Willett*, Barnes, 228. See *per* Lord *Ellenborough*, C. J., *Calton* v. *Bragg*, 15 East, 227.

(*e*) *Marshall* v. *Poole*, 13 East, 98; *Middleton* v. *Gill*, 4 Taunt. 298; *Becher* v. *Jones*, 2 Campb. 428, n.; *Porter* v. *Palsgrave*, 2 Campb. 472; *Boyce* v. *Warburton*, 2 Campb. 480. In 2 Stark. Ev. p. 419, note (*u*), it is observed, that in all these cases there was an agreement *in writing* concerning the mode of payment. This, however, does not appear in all from the report; at all events, the distinction is not adverted to in any of the judgments, and it is difficult to see how it can be material whether the agreement be verbal or written.

goods, and therefore the amount may be well recovered on the general count for goods sold and delivered(*f*). So, where the vendor and purchaser have stated an account, and agreed that the balance should be paid on a particular day, if payment be duly demanded and refused, interest may be recovered from that date(*g*). But it is to be computed from the day when payment was to have been made, and not from the time of merely stating the account(*h*). Interest.

By the Law Amendment Act(*i*) the jury are empowered to allow interest on debts. It is enacted(*k*) that, "upon all debts or sums certain payable at a certain time or otherwise, the jury, on the trial of any issue, or on any inquisition of damages, may, if they shall think fit, allow interest to the creditor, at a rate not exceeding the current rate of interest, from the time when such debts or sums certain were payable, if such debts or sums be payable by virtue of some written instrument at a certain time; or if payable otherwise, then from the time when demand By statute.

(*f*) *Marshall* v. *Poole*, 13 East, 101; *Slack* v. *Lowell*, 3 Taunt. 157. Where there had been a special agreement for interest, which was not declared upon, but the jury gave interest upon the common counts, the Court refused to disturb the verdict; *Harrison* v. *Allen*, 9 B. Moore, 28.

(*g*) *Hammel* v. *Abel*, 4 Taunt. 298; *Pinhorn* v. *Tuckington*, 3 Campb. 468; *Bruce* v. *Hunter*, id. 467; *Blaney* v. *Hendrick*, 3 Wils. 205; S. C. 2 Bl. Rep. 761.

(*h*) *Chalie* v. *Duke of York*, 6 Esp. 45.

(*i*) 3 & 4 Will. IV. c. 42. (*k*) id. s. 28.

Interest.

it has not been expressly agreed [illegible] mercantile securities, and except [illegible] transactions and under speci[illegible] the usage of trade (*b*). In [illegible] greater latitude formerly [illegible] have allowed interest [illegible] have been paid for or[illegible]

Where recoverable.

was then made in [illegible] is now overruled [illegible] coverable unde[illegible]

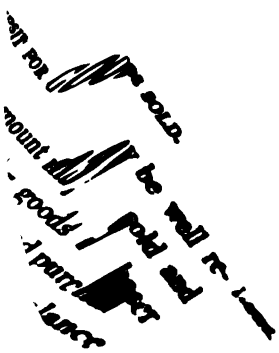
When bill, &c. was to have been given.

But where [illegible] statute and common by a bill o[illegible]ale, and the proof necessary interest w[illegible]e plaintiff's action, the subject of interest [illegible]ue part of the vendee has necessarily have [illegible]ost wholly anticipated. Anything tending is c[illegible]show, that the contract itself is void by the principles of law, or that something, necessary to be performed by the plaintiff, has been left unperformed, may be given in evidence to defeat the action. But care must be taken, that all special matter, intended to be set up as a ground of defence, be specially pleaded; for, by the New Rules of Pleading (*l*), "in all actions of assumpsit (except on bills of exchange and promissory notes (*m*)), the plea of *non assumpsit* shall operate only as a denial in fact of the express contract or promise

Special plea necessary.

(*l*) Rules of Pleading, Hil. T. 4 Will. IV.; *Assumpsit*, 1 and 2. See *Fidget* v. *Penny*, 1 Cr. Mees. & Rosc. 109.

(*m*) In which *non assumpsit* is altogether inadmissible.



the matters of fact from which the promise alleged may be implied in action of indebitatus assumpsit delivered, the plea of *non* only as a denial of the nt of fact." "In every tters of confession and those by way of dis- the transaction to e in point of law on the or otherwise, shall be specially *gr.* infancy, coverture, release, payperformance, illegality of consideration either by statute or common law, drawing, indorsing, accepting &c. bills or notes by way of accommodation, set-off, mutual credit, unseaworthiness, misrepresentation, concealment, and various other defences, must be specially pleaded"(*m*). Thus, the absence of a written agreement, where such

Pleading.

Effect of general issue.

(*m*) The rule of pleading is similar, if the action, instead of assumpsit, be in debt. It is declared, that "the plea of *nil debet* "shall not be allowed in any action." But *nil debuit* is allowable: for, "in all actions on simple contracts (other than on bills, "&c.) the defendant may plead that, *he never was indebted in* "*manner and form as the declaration alleged*; and such plea shall "have the same operation, as the plea of *non assumpsit* in indebi- "tatus assumpsit; and all matters of confession and avoidance "shall be specially pleaded, as in actions of assumpsit;" Rules Hil. T. 4 Will. IV.; *Debt*, 2 and 3. See *Cooper* v. *Whitehouse*, 6 C. & P. 545.

Pleading.

agreement is necessary (*n*), fraud (*o*), the want of sufficient consideration (*p*), the illegality of the consideration (*q*), must be pleaded specially, and are inadmissible under *non assumpsit*.

When several pleas disallowed.

And several pleas, &c. shall not be allowed, "unless a *distinct ground of answer or defence* is intended to be established in respect of each" (*r*). Thus, in an action for goods sold and delivered, a

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(*n*) *Barnett* v. *Glossopp*, 1 Bingh. N. S. 633; S. C. 3 Dowl. P. C. 625; *Ross* v. *Humphreys*, Exch. Trin. T. 1835.

(*o*) *Icely* v. *Grew*, 6 C. & P. 671; *Howell* v. *White*, 1 M. & Rob. 400.

(*p*) *Passenger* v. *Brooks*, 1 Bingh. N. S. 587; *Stoughton* v. *Kilmorey*, 2 Cr. Mees. & Rosc. 72. And a general plea of want of consideration is not contemplated by the rules; such negative plea, though perhaps good after verdict, would be bad on special demurrer. The defendant should affirmatively set forth the facts from which the want of consideration would appear. Thus, to an action on a bill or note, the plea should state (according to the fact), that the instrument was given by way of accommodation, or that there was a wilful misrepresentation on the part of the plaintiff upon the sale of the property in respect of which the bill or note was given. See *per* Lord *Abinger*, C. B., *Easton* v. *Pratchett*, 1 Cr. M. & R. 806, 807; and *per Parke*, B., 2 Cr. M. & R. 105. And see *Lacey* v. *Forrester*, 2 Cr. M. & R. 59; *Stein* v. *Yglesias*, 1 Cr. M. & R. 567; *Low* v. *Chifney*, 1 Bingh. N. S. 267.

(*q*) *Potts* v. *Sparrow*, 1 Bingh. N. S. 594; S. C. 3 Dowl. P. C. 630. This rule applies equally to cases where the illegality is in an agreement which forms the subject of the suit, and to cases where the claim is in respect of illegal services; see 1 Bingh. N. S. 596. But see *Morgan* v. *Ruddock*, 4 Dowl. P. C. 311.

(*r*) Rules Hil. T. 4 Will. IV. § 5.

plea of warranty with a sample, and a plea on an implied warranty of good merchantable quality, will be disallowed together(*s*). This provision, however, is not intended to prevent *inconsistent* defences from being pleaded(*t*), but to prevent two defences, which are *substantially the same*, though different in form, from being pleaded together. Pleading.

Disability to contract is a good defence, and must, of course, be pleaded specially. To *infancy*, the plaintiff may reply that the goods sold were necessaries(*u*), or that the defendant ratified the contract in writing, on obtaining full age(*x*). To *coverture* (pleaded in bar), the plaintiff may reply, that the vendee acted by her husband's authority, or that he subsequently confirmed the contract; and such a replication is no departure, though the husband be not named in the declaration(*y*): or, the plaintiff may reply that the husband was abroad at the time of making the con- Disability.

(*s*) *Steill* v. *Sturry*, 3 Dowl. P. C. 133.

(*t*) *Ducer* v. *Tribuer*, 3 Dowl. P. C. 133; and see *per Bosanquet*, J., id. 135; *Wilkinson* v. *Sewell*, id. 564.

(*u*) See above, p. 16.

(*x*) See p. 21. 9 Geo. IV. c. 14, s. 5.

(*y*) *Prince* v. *Brunatte*, 1 Bingh. N. S. 435. The authority of the husband will be presumed in the case of necessaries (though the presumption may be rebutted), but must be proved, in other cases, to have been expressly or impliedly given. See above, pp. 26, 30.

Pleading.

tract(*z*); but the absence of the husband is no answer to a plea in abatement for nonjoinder(*a*). To a plea of *non compos*, the plaintiff may reply necessaries(*b*). To plea of *attainder*, he may reply a removal of the disability, by pardon, or by the full term of punishment completed(*c*). To plea of *alien enemy* at the time of making the contract(*d*), the plaintiff may reply a licence from the crown(*e*).

Statute of Frauds.

The *Statute of Frauds*, obviously, can be a ground of defence only to an action for not accepting, and not to an action for goods sold; for if there is a delivery and acceptance, it comes within one of the saving clauses of the statute. It seems that, if defendant pleads that there was no agreement in writing to satisfy the statute, the plaintiff's replication may take issue generally, and need not set forth the agreement(*f*). To rebut

(*z*) See above, p. 34.

(*a*) See p. 40.

(*b*) *Baxter* v. *Earl of Portsmouth*, 5 B. & C. 170. See above, p. 42.

(*c*) See p. 44.

(*d*) If the plaintiff has become alien enemy since the commencement of the action, it ought to be pleaded in bar of the *further* maintenance of the suit. *Le Bret* v. *Papillon*, 4 East, 502.

(*e*) See above, p. 48.

(*f*) *Wakeman* v. *Sutton*, 2 Ad. & Ell. 78. Though a contrary opinion had been intimated; *Lowe* v. *Eldred*, 1 Cr. & Mees. 239; S. C. 3 Tyrwh. 234.

the defence, the vendor may show, that the goods did not exceed £10 in value; or, that there was an acceptance of part of the goods by the purchaser to satisfy the statute; or, that there was earnest given, or something in part payment(*g*). Pleading.

To a special action for not accepting, the defendant may plead, that the transaction was fraudulent on the part of the vendor or his agent(*h*), that there was misrepresentation or concealment of something material(*i*); or, that the transaction was immoral(*k*); or, that it was illegal, on the ground of being contrary to the provisions of a statute(*l*), or as being against public policy(*m*); or, that the plaintiff has made default in the performance of a condition precedent(*n*). Fraud. Illegality.

In an action for the price of goods sold and delivered, the defendant may show that the goods have not been delivered(*o*); or, that the sale was on credit, and that the time of credit has not expired(*p*). If the defendant relies on the bad Sale on credit. Bad quality.

(*g*) See above, p. 49—67.

(*h*) See p. 129—135.

(*i*) *Icely* v. *Grew*, 6 C. & P. 671; *Hill* v. *Gray*, 1 Stark. N. P. C. 434.

(*k*) See above, p. 140.

(*l*) See p. 84, and p. 95.

(*m*) See p. 141—147.

(*n*) See p. 230—239.

(*o*) See p. 253. This need not be pleaded specially; for *non assumpsit* will operate as a denial of the delivery in fact.

(*p*) It has been held that this defence ought to be specially pleaded; *Edmunds* v. *Harris*, 4 Nev. & Man. 182; S. C. 6 C.

Pleading. quality of the goods, this must be pleaded specially, where there has been a stipulated price (*q*); but it seems clear that the defence might be given in evidence, without being pleaded, where the plaintiff

Payment. sues on the *quantum valebant* (*r*). If the defendant has paid for the goods, he must plead the payment, and that the plaintiff accepted it in full

Set-off. satisfaction (*s*). If the defendant relies on a set-off, it seems, that, under the New Rules, he must always *plead* the set-off, and that he cannot (as formerly) avail himself of a *notice* of set-off given

Payment into Court. with the general issue (*t*). If the defendant pays money into Court, in respect of part of the

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& P. 547; but it seems that this decision cannot be supported. See *per Parke*, B., *Taylor* v. *Hilary*, 1 Cr. Mees. & Rosc. 743; *Knapp* v. *Harden*, Gale's Rep. 47. Supra, p. 252.

(*q*) *Roffey* v. *Smith*, 6 C. & P. 662. See *Mills* v. *Oddy*, 2 Cr. Mees. & Rosc. 103, 111.

(*r*) For, although it is declared that "performance," i. e. by the *defendant*, shall be pleaded, it is not said that "non-performance" by the *plaintiff* shall be pleaded in all cases; and this seems necessary only in special contracts. In the common indebitatus count the promise to pay is alleged to be in consideration of "being indebted;" and therefore the plea of *non assumpsit* would seem to put in issue every fact which tends to create the debt. See Bosanquet's New Rules, p. 46. And see *per Alderson*, B., 6 C. & P. 545, 546.

(*s*) Yet, although no plea of payment be put on the record, the Court (it seems) will admit evidence of payment in reduction of damages, though not in bar of the action. *Shirley* v. *Jacobs*, 2 Bingh. N. S. 88.

(*t*) *Vid. supra*, p. 279. Sed qu.?

plaintiff's demand, he must plead such payment according to the form prescribed(*u*). Pleading.

(*u*) Rules of Pleading, Hil. T. 4 Will. IV. § 17. The form is as follows:—

The —— day of ——.

C. D. and *A. B.* ats. } The defendant by —— his attorney, [*or*, "in person," &c.] says, that the plaintiff ought not further to maintain his action, because the defendant now brings into Court the sum of £——, ready to be paid to the plaintiff. And the defendant further says, that the plaintiff has not sustained damages [*or, in actions of debt*, "that he is not indebted to the plaintiff"] to a greater amount than the said sum, &c. in respect of the cause of action in the declaration mentioned: and this he is ready to verify. Wherefore he prays judgment if the plaintiff ought further to maintain his action.

See *Sharman* v. *Stephenson*, 3 Dowl. P. C. 709; S. C. 2 Cr. Mees. & Rosc. 75; *Coates* v. *Stephens*, 3 Dowl. P. C. 784. When there are distinct defences to certain portions of the demand, (as may be the case when the particulars claim several demands,) the proper course is, first to exhaust all the defences to the other portions of the demand, and then to plead the payment of money into Court *generally to the residue*. See Bosanquet's New Rules, p. 175.

CHAP. IV.

TROVER BY VENDOR.

When trover the proper remedy.

TROVER by the vendor is the proper form of action, to recover the goods, where the contract becomes void ab initio, or where it has been rescinded after the vendee has obtained possession. Thus, it is the proper remedy where goods have been sold upon credit, and, before the time of credit has expired, the plaintiff discovers that the

Fraud.

defendant has been guilty of fraud in the transaction (*a*); as, where a bill or note has been given in payment, which the purchaser knew at the time to be worth nothing (*b*).

Rescission of contract.

The plaintiff is always at liberty to rescind the contract on the ground of fraud: but on the mere default of one party (without fraud), the other cannot annul the contract, except where both parties can be put *in statu quo* (*c*). By the assent of both parties, the contract may be rescinded at any time (*d*), provided that the rights of

(*a*) *Strutt* v. *Smith*, 1 Cr. Mees. & Rosc. 312, 315; *Fergusson* v. *Carrington*, 9 B. & C. 59; *Abbots* v. *Barry*, 5 B. Moore, 98; *Stephenson* v. *Hart*, 4 Bingh. 476, 484. Supra.

(*b*) *Read* v. *Hutchinson*, 3 Campb. 352, 3.

(*c*) *Hunt* v. *Silk*, 5 East, 449; S. C. 2 Smith, Rep. 15.

(*d*) *Salte* v. *Field*, 5 T. R. 211; *Lovat* v. *Parsons*, Cowp. 61; *Richardson* v. *Goss*, 3 B. & P. 119. See 4 Bingh. 583; *Parry* v. *Dawson*, 3 Anstr. 710; *Bailey* v. *Culverwell*, Dan. & Lloyd, Merc. Ca. 176; S. C. 8 B. & C. 448.

third persons have not intervened (*e*). And after it has been so rescinded, the vendor is in all respects remitted to his former right; therefore he may maintain trover against a third party who has converted the goods, though the conversion have taken place before the goods had revested in the vendor (*f*).

Nullity of contract.

The vendor may bring trover to recover the goods, whenever they have come wrongfully into the vendee's possession without vesting the property in him; as, where the vendee was under terms of paying on delivery, and obtained possession of the goods by giving a check which he had no reasonable expectation at the time would be duly honoured (*g*). Gibbs, C. J., is reported, in the case of *Noble* v. *Adams* (*h*), to have expressed an opinion, that "unless the representations of the purchaser amounted to the offence of obtaining goods under false pretences, it could not be said that the contract was altogether void." Park, J., however, in commenting upon the case, observed (*i*), that the remark was made in reference only to the particular circumstances of that case,

(*e*) *Smith* v. *Field*, 5 T. R. 402. See id. 211. Of the right of the vendor to maintain trover after stopping the goods upon the insolvency of the purchaser, see above, Chap. ii. p. 188—209.

(*f*) *Pattison* v. *Robinson*, 5 M. & S. 105.

(*g*) *Hawse* v. *Crowe*, Ry. & Moody, 414.

(*h*) 2 Marsh. 366; S. C. 7 Taunt. 59. See 2 Marsh. 370; 5 M. & Payne, 390.

(*i*) 5 M. & Payne, 396, 7; 7 Bingh. 552, 3.

and that the general doctrine was not intended to be so laid down. And if the goods in question be proved to have been obtained by fraud, though the defendant may be acquitted by the verdict of the jury of any actual implication in the dishonest transaction, yet it is sufficient to support the plaintiff's action, if the defendant has been involved in the legal consequences of the fraud. Thus, where the original purchasers procured the consignment fraudulently, and without the intention of making payment, and the agent, who effected the purchase, *was also the agent for the defendants* (to whom the goods were afterwards *bonâ fide* transferred), and was cognizant of the fraud of the original purchasers, it was held that the plaintiffs were entitled to recover in trover (*k*); for the defendants must be intended in law to be cognizant of the fraud committed by their agent with the view to benefit them. So the vendor may recover in trover, where the sale was conditional only, and the goods have been accidentally delivered without

(*k*) *Irving* v. *Motley*, 5 M. & P. 380; S. C. 7 Bingh. 543. See *Fitzherbert* v. *Mather*, 1 T. R. 12, 16; Paley, Pr. & A. 258, (3d Ed.). But this is not to be understood as laying down the rule, that, where a party purchases articles, which at the time he knows he will not be able to pay for, though those goods may have passed through other hands in the fair way of purchase, the original seller shall have a right to recover them in whose hands soever they may be found. See *per Tindal*, C. J., 5 M. & P. 393.

the performance of such condition(*l*); or, where the consignee has prevented the consignment from vesting in him by refusing to perform his part of the stipulated contract(*m*). But if the property has in fact been altered by the sale, notwithstanding that the vendee may have been guilty of a breach of some undertaking, trover by the vendor cannot be supported (*n*).

Sale by unauthorized agent.

So, the vendor may maintain trover, where the goods have been sold and delivered to the defendant by a third party, acting as agent, who had no authority to sell(*o*); or, even where the agent had authority to act but exceeds that authority,—as, where a factor, authorized to sell goods, barters(*p*) or pledges(*q*) them,—or, where the factor wrongfully delegates his authority to another to sell the

(*l*) *Bishop* v. *Shillitto*, cited in *Hornblower* v. *Proud*, 2 B. & A. 329, n. See *per Bayley*, J., ibid. 333; *Shepley* v. *Davis*, 5 Taunt. 617; S. C. 1 Marsh. 252.

(*m*) See *Brandt* v. *Bowlby*, 2 B. & Ad. 932. Shipping to the account of the consignee, and transfer to him of unindorsed bill of lading, does not irrevocably vest the property in him, but only vests it subject to the performance by him of his part of the contract. (And see TROVER BY VENDEE, Part 2, Chap. ii.).

(*n*) *Power* v. *Wells*, 1 Dougl. 24, n.; S. C. Cowp. 818; *Emanuel* v. *Dane*, 3 Campb. 299.

(*o*) *Dyer* v. *Pearson*, 3 B. & C. 38; S. C. 4 D. & R. 648.

(*p*) *Guerreiro* v. *Peile*, 3 B. & A. 616; *Howard* v. *Chapman*, 4 C. & P. 508.

(*q*) *Paterson* v. *Tash*, 2 Stra. 1178; *Kuckein* v. *Wilson*, 4 B. & A. 443. See next page.

goods (*r*),—or, where he acts after his authority has been revoked (*s*).

Factor could not pledge at common law.

An important alteration has been made in the law, in respect of the power of a factor to pledge the goods of his principal. It had frequently been decided (*t*), that a factor had no right whatever to pledge, because, it was said, the power of a factor is strictly a power to sell; and although it was admitted to be a hard case that the pawnee should have no claim against the owner, on the ground that the pledgor was a mere factor, whether the pawnee was ignorant or cognizant of his character as such, yet the law was considered too well established to be shaken. For it was held, that, as the factor's lien was a personal privilege, and not transferable, the pledgee (with or without notice) had not a claim even to the extent of the factor's claim against the principal, and that the owner therefore

(*r*) *Solly* v. *Rathbone*, 2 M. & S. 298. See *Cochran* v. *Irlan*, 2 M. & S. 301, n.; *Schmaling* v. *Tomlinson*, 6 Taunt. 147.

(*s*) See *Dickenson* v. *Lilwal*, 1 Stark. N. P. C. 128; *Farmer* v. *Robinson*, 2 Campb. 339, n.; *Bristow* v. *Taylor*, 2 Stark. N. P. C. 50; *Jackson* v. *Clarke*, 1 Y. & J. 216.

(*t*) *Paterson* v. *Tash*, 2 Str. 1178; *Daubigny* v. *Duval*, 5 T. R. 604; *Martini* v. *Coles*, 1 M. & S. 140; *Shipley* v. *Kymer*, 1 M. & S. 484; *Boyson* v. *Coles*, 6 M. & S. 14; *Pickering* v. *Busk*, 15 East, 44; *Feather·tonhaugh* v. *Johnston*, 8 Taunt. 237; *Guichard* v. *Morgan*, 4 B. Moore, 36; *Duclos* v. *Ryland*, 5 B. Moore, 518, n.; *De Bouchot* v. *Goldsmid*, 5 Ves. Jun. 211; *Peet* v. *Baxter*, 1 Stark. N. P. C. 472; *Stierneld* v. *Holden*, Ry. & M. 219; *Williams* v. *Barton*, 3 Bingh. 139.

might maintain trover without tendering to the pledgee even the amount due to the factor (*u*).

Factor's Act.

By the statute 6 Geo. IV. c. 94 (*x*), commonly called the Factor's Act, it is enacted,—

Person in whose name goods are shipped, to be deemed true owner, &c.

By the 1st section, that the person, in whose name goods are shipped, is to be deemed the true owner thereof, so far as to entitle the consignee to a lien thereon in respect of any money or negotiable security advanced by him to such person to his use, *if he has no notice by the bill of lading or otherwise*, at or before the advancement or receipt, that such person is not the actual and bonâ fide owner of the goods; and such person shall be taken for the purposes of the Act to have been entrusted with the goods for the purpose of consignment or of sale, unless the contrary shall be made to appear (*y*).

What is notice.

As to the question what amounts to sufficient *notice*, within the meaning of this section, it seems that it is not necessary to show that the pledgee had *positive information* that he was dealing with a mere agent, but that it is sufficient if the circumstances are shown to be such that this conclusion might reasonably have been drawn. In a

(*u*) *M'Combie* v. *Davies*, 6 East, 538; *Newsom* v. *Thornton*, 6 East, 17; *Daubigny* v. *Duval*, 5 T. R. 604.

(*x*) This act was passed to alter and amend 4 Geo. IV. c. 83.

(*y*) See Paley, Pr. & A. p. 222, (3d Ed.); Abb. Shipp. pp. 381, 382, (5th Ed.).

Factor's Act.

case where the point arose, Lord Tenterden was of opinion, that the pledgee would not be within the protection of the statute, if he had even *good reason to suspect* that the party pledging was not the true owner. "Although there may be no evidence of direct communication, yet, if the circumstances are such that a reasonable man and a man of business applying his understanding to them would know that the goods did not belong to the broker who pledged them, the defendant is not entitled to retain them" (*z*). It seems that delay on the part of the principal in making known that he was owner, to a pledgee who has taken the goods without notice, cannot be construed as a confirmation or adoption of the pledge (*a*), unless it appear that the consequence of the delay has been an alteration in the defendant's situation for the worse, or in the plaintiff's for the better (*b*).

Right of pledgee without notice.

By the 2nd section of the Act, a person entrusted with, and in possession of, a bill of lading or other document (of the species enumerated in the act), is to be deemed the true owner of the goods described therein, so far as to give validity to

(*z*) *Evans* v. *Trueman*, 1 M. & Rob. 10; reported also in Paley, Pr. & A. 229. See the observations of Lord *Tenterden*, C. J.

(*a*) *Robertson* v. *Kensington*, Lloyd & Welsby, Merc. Ca. 187. See 5 Man. & Ryl. 387.

(*b*) Lloyd & Welsby, 192, *per* Lord *Tenterden*, C. J.

any contract made by him for the sale or disposition of the goods, *or the deposit or pledge thereof* as a security for any money or negotiable instrument, if the buyer, transferee, or pledgee *has not notice*, by the document or otherwise, that such person is not the actual and bonâ fide owner of the goods. Factor's Act.

It has been decided upon this section, that the "negotiable instruments," mentioned as a security, include only such as pass by indorsement and delivery, and not East India warrants or other documents of that nature(*c*).

By the 3rd section, any person taking goods in deposit or pledge from the party in possession, *without notice* that he is not the owner thereof, *for a pre-existing debt*, shall acquire such right, title, or interest, and no further or other than was possessed or might have been enforced by the party making the deposit or pledge. Right of pledgee for pre-existing debt, without notice.

Under this section, then, the disponee or pledgee acquires no further right than the party possessed who made the deposit or pledge(*d*); so that, to

(*c*) *Taylor* v. *Trueman*, 1 M. & Malk. 453; S. C. Lloyd & Welsby, Merc. Ca. 184; *Taylor* v. *Kymer*, 3 B. & Ad. 320. [It is singular that in the admirable abridgement of this act given in Lord *Tenterden's* Treatise on Shipping, and which has generally been followed with little variation, the clause in this section on which these cases are decided (viz. "as a security for any "money or negotiable instrument") is wholly omitted. See Leg. Exam. vol. iv. p. 339, 340.]

(*d*) See 3 B. & Ad. 337.

Factor's Act.

enable the owner to sue for the goods in trover, a tender to the pledgee, of the amount only that was due to the factor, is necessary. And such tender is necessary only when the defendant has kept the goods in his hands, and not where he has sold them before demand (*e*), although the measure of damages, in the action of trover, may be only the balance after deducting the amount of the factor's claim (*f*).

Right of pledgee with notice.

By the 5th section (*g*), any person may accept any goods, or any such document as aforesaid, on deposit or pledge from any factor or agent, *notwithstanding he shall have notice* that the party is a factor or agent; but in such case he shall acquire such right, title, or interest, and no further or other than was possessed by the factor or agent at the time of the deposit or pledge.

Upon this section it has been decided, that, to bring the case within the meaning of the Act, the transaction must be a *bonâ fide* deposit or pledge,

(*e*) *Taylor* v. *Trueman*, 1 M. & Malk. 455, 457; S. C. Lloyd & Welsby's Merc. Ca. 184.

(*f*) 1 M. & Malk, 456, 457.

(*g*) The 4th section is merely in confirmation of the common law. It provides that any person may purchase goods from, and pay the price to, an agent entrusted with the possession of the goods, or to whom they may be consigned, even *with notice* that he is agent, provided the party has not notice at the time that the agent is not authorized to sell or to receive the price. *Vid. supra*, p. 278.

and that therefore a *sale*, made by an agent fraudulently as against his principal, transfers no right to the purchaser (*h*). The pledgee acquires a right and interest in every respect similar to that possessed by the agent at the time of the deposit, whether such right was absolute or contingent. Thus, where, at the time of the pledge, the broker's claim was founded on a right to indemnity against liabilities which he was under from having given his acceptance to bills drawn by the principal, it was held, that, as the broker's right would have become absolute, in the event of the acceptances not having been taken up when due, so the pledgee's right would have become absolute on the same event (*i*); but as the broker's claim would have been discharged on the principal's releasing him from his liabilities, so the pledgee's right, being dependent on the same condition, was likewise discharged (*k*). In order to give the factor a lien transferable to the pawnee under the statute, it is necessary that the *general balance* of account should be in favour of the factor;

Factor's Act.

What right transferred to pledgee.

(*h*) *Thompson* v. *Farmer*, 1 M. & Malk. 48.

(*i*) In *Blandy* v. *Allan*, Dan. & Lloyd's Merc. Ca. 22, *Best*, C. J., expressed an opinion that the pledge could transfer no right whatever, unless the factor's lien was *absolute* at the time. But *Fletcher* v. *Heath* seems to overrule the opinion: the right is equally transferable, though only conditional or contingent at the time, i. e. such, that subsequent circumstances may render it *enforceable*.

(*k*) *Fletcher* v. *Heath*, 7 B. & C. 517. See Dan. & Lloyd, 24, n.

Factor's Act.

therefore, where there were distinct accounts between the principal and the factor, and a balance was due to the latter on that particular account to which the goods pledged belonged, but the general balance was in favour of the principal, it was held, that the accounts could not be separated, that the factor therefore had no lien, and that the principal might recover in trover against the pawnee (*l*).

When true owner may recover.

It is further provided (*m*), that the Act shall not prevent the true owner of the goods from recovering the price from the buyer, subject to any right of set-off on the part of the buyer against the factor or agent; nor from recovering the goods deposited or pledged, upon repayment of the money, or restoration of the negotiable instrument, advanced on the security thereof to the factor or agent, and upon payment of such further money, or restoration of such other negotiable instrument (if any), as may have been advanced by the factor or agent to the owner, or on payment of money equal to the amount of such instrument; nor from recovering from any person any balance remaining in his hands, as the produce of the sale of the goods after deducting the money or negotiable instrument advanced on the security thereof.

(*l*) *Robertson* v. *Kensington*, 5 Man. & Ry. 381; S. C. Lloyd & Welsby Merc. Ca. 187.

(*m*) 6 Geo. IV. c. 94, s. 6.

PART II.

RIGHTS AND REMEDIES OF VENDEE IN RESPECT OF VENDOR.

WHERE the vendor makes default in the delivery of the goods, the purchaser may bring Assumpsit on the special contract for not delivering (*a*); or, if the vendor detains the goods after the property and right of possession have vested absolutely in the purchaser, Trover (*b*) will lie to recover them. If there has been at the time of the sale a Warranty of the goods, which is afterwards broken, the purchaser may maintain an action for the breach (*c*).

CHAP. I.

ASSUMPSIT FOR NOT DELIVERING.

IF the vendor refuses to perform the contract and to deliver the goods, the vendee may bring assumpsit for the non-delivery. To support such action, he must prove the assent of both parties to the contract; the terms of the contract as laid in

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(*a*) Chap. i.
(*b*) Chap. ii.
(*c*) OF WARRANTY, AND DECEIT, Chap. iii.

Proof.

the declaration; his own performance of conditions precedent; and the breach by the vendor, and the damages which he has sustained by such non-performance (*a*).

Assent of parties.

The plaintiff must prove that the contract was completed by mutual consent. Thus, where the defendant merely proposed to sell and deliver the goods to the plaintiff upon certain terms, upon condition that the plaintiff would notify his acceptance of the terms within a certain period, it was held that, although the plaintiff accepted the offer within the period specified, he could not recover in an action for non-delivery, because, as the plaintiff was not bound by the original offer, there was no consideration to bind the defendant (*b*); and it is the same whether the defendant merely *omitted to notify* his subsequent ratification, or whether he performed some *overt act of dissent*, as by offering the goods to another person before the expiration of the period (*c*). But where the defendant offers by letter to sell goods, he is considered as renewing his offer every moment until the time at which the answer is to be sent, and then the contract is

(*a*) See above, p. 212—241, of the proof necessary to support an action by vendor for not accepting.

(*b*) *Cooke* v. *Oxley*, 3 T. R. 653.

(*c*) *Head* v. *Diggon*, 3 Man. & Ry. 97. See *Routledge* v. *Grant*, 4 Bingh. 653; *Ellis* v. *Mortimer*, 1 N. R. 257. Supra, p. 213.

completed by acceptance of the offer(*d*). For, otherwise, no contract could be completed by post; since, if the defendant were not bound by his offer when accepted by the plaintiff until the answer was received, then the plaintiff ought not to be bound until after he had received the notification that the defendant had received his answer and assented to it; and so on *ad infinitum*. Assent of the parties.

In an action for not delivering, the plaintiff must prove that he has performed all that ought to be done on his part; as, payment or tender of the price. "If a man agree with another for goods at a certain price, he may not carry them away before he hath paid for them; for it is no sale without payment, unless the contrary be expressly agreed"(*e*). So, where the defendant undertook to deliver the goods in consideration of the delivery of other goods by the plaintiff, it was held, that an action could not be maintained by the plaintiff without averment and proof of performance of his part of the contract(*f*). So, where the defendant has agreed to supply the goods at certain intervals, to be paid for on delivery, he will not be liable for refusing to supply on credit(*g*), although he may Performance of conditions precedent.

(*d*) *Adams* v. *Lindsell*, 1 B. & A. 681.

(*e*) 2 Bl. Comm. 447; *Morton* v. *Lamb*, 7 T. R. 125; *Cowper* v. *Andrews*, Hob. 41.

(*f*) *Parker* v. *Rawlings*, 4 Bingh. 280; S. C. 12 B. Moore, 529. Of conditions precedent in general, see above, p. 230.

(*g*) *Withers* v. *Reynolds*, 2 B. & Ad. 882.

Conditions precedent.

have supplied part without insisting on ready-money payment (*h*).

Where the agreement was, to deliver the goods upon a selection of them by the vendee, he cannot recover without proving that he has made the selection (*i*). So, where the agreement was, to deliver generally, or upon request, a request to deliver must be proved to have been made (*k*); unless the vendor has by his own act dispensed with the necessity of such request, as, by reselling the goods, or otherwise incapacitating himself from performing his undertaking (*l*). But the plaintiff need not show that he has made a tender of the price: it will be sufficient to aver that he was ready and willing to receive and pay for the goods (*m*). And a demand of the goods, whether made by the purchaser himself (*n*), or by his agent or servant (*o*), is evidence in support of the averment that plaintiff was ready and willing.

Breach.

In giving proof of the breach of the contract,

(*h*) *Payne* v. *Shadbolt*, 1 Campb. 427. Supra.

(*i*) *Raynay* v. *Alexander*, Yelv. 76; Selw. N. P. 113, (8th Ed.).

(*k*) *Bach* v. *Owen*, 5 T. R. 409; 1 Chit. Pl. 289.

(*l*) *Bowdell* v. *Parsons*, 10 East, 359.

(*m*) *Rawson* v. *Johnson*, 1 East, 203; *Waterhouse* v. *Skinner*, 2 B. & P. 447. See 6 East, 555, 560; 1 Wms'. Saund. Rep. 320 e, note 5.

(*n*) *Wilks* v. *Atkinson*, 6 Taunt. 11; S. C. 1 Marsh. 412; *Levy* v. *Herbert*, 7 Taunt. 314; S. C. 1 B. Moore, 56.

(*o*) *Squier* v. *Hunt*, 3 Price, 68.

if the vendee wishes to insist, in support of his case, that the ordinary construction of the terms is varied by mercantile usage, the declaration ought to contain proper averments to that effect; otherwise the words will be construed by the Court according to their usual acceptation. Thus, where the agreement was, that the defendant should sell, and the plaintiff should purchase, "all the naphtha that the defendant should make during the term of two years then next ensuing, *say from* 1000 *to* 1200 *gallons per month*," the Court held, that, in the absence of proper averments in the declaration attributing to the words any other sense than that which they naturally bear, the contract must be literally construed. Accordingly it was determined that the agreement in substance amounted to no more than, that the plaintiff should accept as much as the defendant might manufacture during the two years, and not that the defendant undertook at all events to manufacture the quantity expressed; therefore, the declaration, assigning as a breach that the defendant had not manufactured the quantity specified, was bad on the face of it(*p*). Breach.

(*p*) *Gwillim* v. *Daniell*, 1 Cr. Mees. & R. 61. Had the contract, according to the above construction, really been broken, the breach assigned would have been, "that defendant had only delivered so many gallons per month, *whereas he had manufactured more*." To support the breach in the text, the plaintiff ought to have explained the meaning of the word "say," and to have

Breach. Where the agreement is to deliver on a certain condition, and the condition (without any default on the part of the vendor) never comes to pass, he will not be liable for non-delivery (*q*). But if the agreement to deliver was absolute and unqualified, the vendor will be liable for the breach, although he could not help the non-performance (*r*); for it is his own folly if he runs the risk of undertaking to perform an impossibility.

Damages. In an action upon a contract for not delivering goods, the measure of damages should be calculated according to the price of the goods at or about the day when they ought to have been delivered (*s*). Thus, in a very late case, where an action was brought for the non-delivery of a quantity of linseed, the damages were estimated according to the difference between the contract price, and the price at the time when the delivery ought to have taken place (*t*). And although the purchaser had

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shown that it was intended as a sort of warranty that defendant would at all events manufacture the quantity expressed.

(*q*) *Boyd* v. *Siffkin*, 2 Campb. 326; *Alewyn* v. *Pryor*, 1 Ry. & M. 406; *Idle* v. *Thornton*, 3 Campb. 274; *Hawes* v. *Humble*, 2 Campb. 327, n.; *Hayward* v. *Scougall*, 2 Campb. 56; *Thornton* v. *Simpson*, 6 Taunt. 556.

(*r*) *Splidt* v. *Heath*, 2 Campb. 57, n.; *Atkinson* v. *Ritchie*, 10 East, 530. See *Worsley* v. *Wood*, 6 T. R. 710; *De Medeiros* v. *Hill*, 5 C. & P. 182; *Gosling* v. *Higgins*, 1 Campb. 451.

(*s*) *Gainsford* v. *Carroll*, 2 B. & C. 624; S. C. 4 D. & R. 161; *Leigh* v. *Paterson*, 8 Taunt. 540; S. C. 2 B. Moore, 588.

(*t*) *Startup* v. *Cortazzi*, 2 Cr. Mees. & R. 165. For, if it had been delivered then, the plaintiff might have resold it.

advanced part of the price, it was held, that the quantum of damages ought only to be increased by the amount of such advance together with simple interest thereon, unless the plaintiff prove, that, under the circumstances, he has sustained special damages by the vendor's default (*u*). Damages.

But, in an action for not replacing stock on a particular day, the highest value during the time of the trial was taken as the standard in computing the amount of damages (*x*). For, in the case of a loan of stock, the borrower holds in his hands the money of the lender, and thereby prevents him from using it altogether; but, in other cases, the plaintiff has the money in his possession, and may purchase other goods of the like description and quality the very day after the contract is broken.

(*u*) S. C. At the trial Lord *Abinger*, C. B., directed the jury not to give speculative or vindictive damages; See 2 Cr. Mees. & R. 169.

(*x*) *Shepherd* v. *Jackson*, 2 East, 211; *M'Arthur* v. *Seaforth*, 2 Taunt. 257; *Downes* v. *Back*, 1 Stark. N. P. C. 318; *Harrison* v. *Harrison*, 1 C. & P. 412.

CHAP. II.

TROVER BY VENDEE.

Right of possession necessary to maintain trover.

IN order to maintain an action of trover for the goods, the vendee must be able to prove, not only that the property has vested in him, but also that he has the right of possession(*a*). "The right of property and the right of possession are distinct from each other; the right of property may be in one person, while the right of possession may be in another"(*b*).

The subject of the change of property in goods has been already considered, in reference to the subject of the Statute of Frauds(*c*), and in reference to the proof required by the vendor to support an action for goods sold and delivered(*d*):—both of which are in some degree analogous to the present subject.

The property may vest in the purchaser, so as

(*a*) See *per Bayley*, J., 4 B. & C. 950.

(*b*) *Per Bayley*, J., 6 B. & C. 364. The right of *property* is vested in the buyer by the *contract of sale;* but the right of *possession* is not transferred to him until *payment of the price.* See 4 B. & C. 948.

(*c*) Supra, p. 57—67.

(*d*) Supra, p. 253—264.

to enable him to maintain trover, by a symbolical delivery of the goods (*e*), or by the vendor giving a delivery order, when the goods are in the custody of a warehouseman or other bailee (*f*), or by the indorsement, for valuable consideration, of a West-India Dock warrant (*g*), or a bill of lading (*h*). Change of property.

The assignee of a bill of lading may maintain trover for the goods, though there had been a prior consignment to one who has since become insolvent, provided that the vendor's right of stopping the goods was not determined at the time of the Assignment of bill of lading.

(*e*) See *Manton* v. *Moore*, 7 T. R. 67.

(*f*) *Tucker* v. *Ruston*, 2 C. & P. 86; *Hawes* v. *Watson*, 2 B. & C. 540; *Holl* v. *Griffin*, 3 M. & Scott, 732.—Supra.

(*g*) *Spear* v. *Travers*, 4 Campb. 251; *Lucas* v. *Dorrien*, 7 Taunt. 278. See above, p. 193, note (*x*).

(*h*) *Haille* v. *Smith*, 1 B. & P. 563; *Wright* v. *Campbell*, 4 Burr. 2046; *Evans* v. *Martlett*, 1 Ld. Raym. 271; *Cumming* v. *Brown*, 9 East, 506; S. C. 1 Campb. 104; *Brown* v. *Heathcote*, 1 Atk. 160; *Lempriere* v. *Pasley*, 2 T. R. 485. Where several bills of lading, all in effect to the same purport, have been signed by the captain, the party who first becomes legally possessed of one of the documents, without reference to the time when each was signed, is entitled to the consignment; *Caldwell* v. *Ball*, 1 T. R. 205; see id. 215.

A bill of lading is not negotiable by mere delivery without indorsement (*Nix* v. *Olive*, Abb. Shipp. 403); but it is immaterial whether the indorsement be in blank or to a particular person (*Lickbarrow* v. *Mason*, 1 H. Bl. 360; *Haille* v. *Smith*, 1 B. & P. 563). By the Factor's Act (6 Geo. IV. c. 94, s. 2), the person in possession of a bill of lading is to be deemed and taken to be the true owner of the goods &c. described therein, so as to give validity to contracts without notice; See above, p. 298.

Bills of lading.

indorsement (*i*). But the property does not pass to enable the indorsee to maintain trover, if no consideration has been given (*k*); or if the indorsee had notice of a prior claim (*l*); or of circumstances which render the instrument not fairly and honestly assignable (*m*), as, where the indorsement was made by one partner in a firm without authority, the indorsee being privy to the misapplication (*n*). So, the indorsement does not pass the property, where the bill of lading was signed and given before the cargo was put on board (*o*); or, where the indorsement was not made until after an unqualified delivery on board the vessel in favour of a third party (*p*); or, where it appears on the face of the bill of lading or the invoice, that the party indorsing was not entitled to the goods as owner, but had only received instructions to sell them as agent on the account of another (*q*). So it is, if the bill

(*i*) *Morison* v. *Gray*, 9 B. Moore, 484; S. C. 2 Bingh. 260. Supra, p. 188—209.

(*k*) *Waring* v. *Cox*, 1 Campb. 369; *Tucker* v. *Humphery*, 4 Bingh. 522; *Fearon* v. *Bowers*, 1 H. Bl. 364, n.

(*l*) *Dick* v. *Lumsden*, Peake, 189; *Salomons* v. *Nissen*, 2 T. R. 674; *Wright* v. *Campbell*, 4 Burr. 2051.

(*m*) See 9 East, 516; *Holliday* v. *Mann*, 2 C. & P. 509. See above, p. 196.

(*n*) *Smaith* v. *Burridge*, 4 Taunt. 684.

(*o*) *Osey* v. *Gardner*, Holt, N. P. C. 405.

(*p*) *Ogle* v. *Atkinson*, 5 Taunt. 759. See *per Gibbs*, C. J., *Nathan* v. *Giles*, 5 Taunt. 575; *Thompson* v. *Trail*, 2 C. & P. 334; S. C. 6 B. & C. 36.

(*q*) *Selleck* v. *Smith*, 3 Bingh. 603.

of lading was specially indorsed on certain conditions, which conditions are not complied with (*r*). For, although, *primâ facie*, by shipping the goods on behalf of the consignee, and indorsing the bill of lading, the property is transferred absolutely, yet this is subject to be controlled by the special agreement or the evident understanding between the parties (*s*). Bills of lading.

It seems that, after the consignment has been once made in favour of any party, nothing except the insolvency of the consignee can give the consignor a right of countermanding the goods. Thus, where the bill of lading expressed that the cargo was consigned to J. S., and on his account and risk, and the consignor, being apprehensive, from the refusal of the agent to accept the drafts on behalf of J. S., that the insolvency of the latter was probable, afterwards procured a countermand

(*r*) See *Barrow* v. *Coles*, 3 Campb. 92. The case even goes further. The bill of lading had a special indorsement by the consignor, that the cargo was to be remitted to J. S. *in case he accepted and paid* the bill drawn for the price, otherwise to the holder of the draft. The cargo was accordingly remitted to J. S., who accepted the bill but failed to make payment when due: it was held, that the holder of the draft might maintain trover against the party to whom J. S. had indorsed the bill of lading for a valuable consideration. A fortiori, therefore, trover would have been maintainable against J. S.; and the case places his *bonâ fide* indorsee in the same situation: for under the circumstances he ought to have made inquiry whether the condition had been performed.

(*s*) *Hibbert* v. *Carter*, 1 T. R. 745. See *Brandt* v. *Bowlby*, 2 B. & Ad. 932.

Bills of lading.

of the original consignment, and an order to the master to deliver the cargo to a different person, to be indorsed on the bill of lading,—it was held, that he was not justified in so countermanding the consignment, and that the original consignee, therefore, was entitled to the cargo (*t*). So, where, at the time that the consignment was made and the invoice and bill of lading were sent to the plaintiff, the consignor drew bills on the consignee nearly to the value of the cargo, and the consignee refused to accept the drafts (a large balance being due to the latter at the time), it was held that this did not amount to an implied refusal of the consignment (*u*).

Trover not maintainable when something remains to be done.

Trover is not maintainable by the purchaser if anything remain to be done between him and the seller to ascertain the price, quantity, or individuality of the goods, before the commodity pur-

(*t*) In re the CONSTANTIA, *Henricksen*, 6 Rob. Adm. 321. See the luminous judgment of Sir William Scott. "It is not an unlimited power that is vested in the consignor to vary the consignment at his pleasure in all cases whatever; but it is a privilege allowed to the seller for the particular purpose of protecting him against the insolvency of the consignee;" *id.* 326. "The alteration may be made provisionally, without actual insolvency; but if the insolvency does not take place, the act which has been done is a mere nullity, and the seller has exercised a power to which the law does not ascribe any legal effect;" *id.* 330. And see the cases cited from Emerigon, *id.* 328, 329. *Walley* v. *Montgomery*, 3 East, 585.

(*u*) *Anderson* v. *Clark*, 2 Bingh. 20.

chased is to be delivered(*x*). Thus, where a chattel is made to order, the property does not pass until completion and delivery; therefore, trover by the vendee cannot be supported(*y*). But if payment has been made for the chattel ordered, and the purchaser has been allowed to exercise acts of ownership after it has been finished, the property will be transferred so as to enable him to bring trover(*z*). And where the chattel made to order was to be paid for by instalments during the progress of the work, it was held that such payments specifically appropriated in the purchaser the parts respectively for which the successive payments were made(*a*). When maintainable.

So, the action cannot be maintained where the quantity is yet to be fixed by measuring or weighing(*b*), or where anything is yet to be done which can affect the quantity which has been agreed to be delivered to the purchaser(*c*). It is immaterial

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(*x*) Selw. N. P. 1300; 2 Wms'. Saund. Rep. 47 *l*.

(*y*) *Mucklow* v. *Mangles*, 1 Taunt. 318. See 8 B. & C. 277; 10 Bingh. 99.—Supra.

(*z*) *Carruthers* v. *Payne*, 5 Bingh. 270; S. C. 2 M. & Payne, 429.

(*a*) *Woods* v. *Russel*, 5 B. & A. 942, 946. See 8 B. & C. 282.

(*b*) *White* v. *Wilks*, 5 Taunt. 176; *Shepley* v. *Davis*, 5 Taunt. 617; S. C. 1 Marsh. 252; *Hanson* v. *Meyer*, 6 East, 614; *Austen* v. *Craven*, 4 Taunt. 644; *Busk* v. *Davis*, 2 M. & S. 397; *Withers* v. *Lys*, Holt, N. P. C. 18; S. C. 4 Campb. 237.

(*c*) *Wallace* v. *Breeds*, 13 East, 522; *Rugg* v. *Minett*, 11 East, 210.

When maintainable.

whether what remains to be done is to be done by the vendor himself, or by some third party, such as a wharfinger or other bailee in whose custody the goods are deposited, provided the vendor continues to be still in fact interested(*d*), because in such case the bailee is the mere agent of the vendor, and his act is the act of the principal. But if everything is in effect done as between the buyer and seller, though something remain to be done between the buyer and a third party, in which the seller is not interested, the property passes sufficiently to support trover;—thus, where the seller, having ten tons of oil (the quantity being admitted) in the warehouse of J. S., gave the plaintiff an order to receive that quantity from J. S., it was held that the property in the oil passed to the plaintiff, although the ten tons had still to be separated from the bulk of the property of J. S.(*e*). Again, where the vendor gave the plaintiff an order on a wharfinger for the delivery of twenty sacks of flour, which order when presented to the wharfinger was accepted generally, and five sacks

(*d*) *Hanson* v. *Meyer*, 6 East, 614; *Busk* v. *Davis*, 2 M. & S. 397.

(*e*) *Whitehouse* v. *Frost*, 12 East, 614. The decision itself, indeed, has been doubted (4 Taunt. 646; 5 Taunt. 179), because it went to put a sub-vendee in a better plight than the original purchaser; which is unreasonable, and cannot be supported, (*Austen* v. *Craven*, 4 Taunt. 644): but perhaps, to the extent laid down in the text, the authority is not overruled. See *per* Lord *Ellenborough*, C. J., 13 East, 525.

were delivered at the time, it was held, that trover for the residue was maintainable against the wharfinger, and that his unrestricted acceptance of the order precluded him from afterwards setting up, as a defence to the action, that the remaining fifteen sacks were not selected and appropriated(*f*). When maintainable.

As long as the vendor's lien for the price of the goods continues, the purchaser has not the right of possession, and cannot maintain trover(*g*). Where it is stipulated at the time of the contract, that payment shall be made immediately, the right of possession does not pass, and trover cannot be maintained until payment(*h*). So it is, where a Not while vendor's lien continues.

(*f*) *Gillett* v. *Hill*, 4 Tyrwh. 290; S. C. 2 Cr. & Mees. 530.

(*g*) See above of LIEN, p. 181. It seems to be doubtful whether under the New Rules of pleading (Rules Hil. T. 4 Will. IV.), lien as a ground of defence to an action of trover should be specially pleaded. *Vid. per Cur.*, *Stancliffe* v. *Hardwick*, 3 Dowl. P. C. 776, 777; S. C. 2 Cr. Mees. & R. 1, 12. The rule provides that "in actions on the case, the plea of *not guilty* shall operate as a denial only of the breach of duty or wrongful act alleged to have been committed by the defendant, and not of the facts stated in the inducement, and no other defence than such denial shall be admissible under such plea: all other pleas in denial shall take issue on some particular matter of fact alleged in the declaration." And, "in an action for converting the plaintiff's goods, such plea will operate as a denial of the conversion only, and not of the plaintiff's title to the goods." "All matters in confession and avoidance shall be pleaded specially as in actions of assumpsit."

(*h*) *Bloxham* v. *Sanders*, 4 B. & C. 941.

When maintainable.

future day is fixed for payment, and default is then made(*i*); or, where the vendee has agreed to pay according to a particular arrangement (though not otherwise binding upon him), which he afterwards fails to do(*k*). And, where nothing is specified by the contract as to the relative times of delivery and payment, it will be intended that the vendee ought to pay the price before he is entitled to possession(*l*). Blackstone says, "If a man agrees with another for goods at a certain price, he may not carry them away before he hath paid for them; for it is no sale without payment, unless the contrary be expressly agreed"(*m*). Even, where part has been delivered to a sub-vendee, trover cannot be maintained for the residue, without paying the price and the warehouse dues, if it do not appear that, by the transfer of part, the whole was intended to be delivered(*n*). Where the agreement was, that the goods should remain in the vendor's

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(*i*) *Bloxham* v. *Morley*, 4 B. & C. 951.

(*k*) *Norris* v. *Williams*, 1 Cr. & Mees. 842.

(*l*) See *per Bayley*, B., 2 Cr. & Mees. 511. But if the vendor takes a note in payment and consents to allow the goods to remain on his premises, the purchaser may support trover on his refusal to give them up; *Atkinson* v. *Barnes*, Lofft, 325.

(*m*) 2 Comm. p. 447.

(*n*) *Miles* v. *Gorton*, 2 Cr. & Mees, 504; S. C. 4 Tyrwh. 295. See *Dixon* v. *Yates*, 5 B. & Ad. 313, 341, 342; *supra*. Or, there may be circumstances to show that the delivery was intended to be *qualified and conditional only*; see per Lord Tenterden, C. J., and Bayley, J., 8 B. & C. 619, 621.

hands until they were paid for, it was held, that, on the bankruptcy of the purchaser, the assignees could not maintain trover without payment or tender of the price(*o*). So, where it had been originally agreed that the duties were to be paid by the purchaser, it was held that the assignees on his bankruptcy could not maintain trover without such payment(*p*). When maintainable.

It may then be laid down, that, in general, the purchaser cannot maintain trover without a payment or tender of all the expenses to which he is liable(*q*): if, however, by the express terms of the agreement, the delivery is to take place immediately, or if the day of delivery is expressed to precede the time of payment, he may bring trover on the default of delivery, without paying or tendering the price(*r*).

(*o*) *Bloxham* v. *Sanders*, 4 B. & C. 941; *Bloxham* v. *Morley*, id. 951.

(*p*) *Winks* v. *Hassell*, 9 B. & C. 372; S. C. Dan. & Lloyd, Merc. Ca. 312.

(*q*) *Holderness* v. *Shackels*, 8 B. & C. 612. The action in this case, however, was not between vendee and vendor.

(*r*) See Shep. Touchst. 224, 5; 2 Stark. Ev. p. 889; Dyer, 30a; *Anon.*, Comb. 381; *Crawshay* v. *Homfray*, 4 B. & A. 52, *per Holroyd*, J.

CHAP. III.

OF ACTIONS FOUNDED ON WARRANTY AND DECEIT.

WHERE the vendor is guilty of a breach of warranty, the purchaser may bring an action of assumpsit or case to recover damages for such nonfeasance or misfeasance (*a*): or, if the vendor has been guilty of deceit in the sale, or has made a false representation, by which, although not amounting to a warranty, the purchaser is damnified, he may bring an action on the case for the deceit (*b*): or, if the deceit or breach of warranty be under such circumstances as to render it competent for the purchaser to rescind the contract, he may bring an action for money had and received to recover back the price paid, as on a failure of the consideration (*c*).

CASE FOR DECEIT.

Where the vendor has made a false affirmation concerning the chattel sold, which does not

(*a*) See below, p. 334.
(*b*) See below.
(*c*) See below, p. 327.

amount to a warranty, the vendee may bring an action on the case for deceit, or in the nature of deceit; and this form of action may be supported in several cases where no action of warranty would lie. Thus, it is reported in an old case (*d*), that the declaration had been laid on a warranty to deliver merchantable commodities, whereas defendant had delivered dirty ashes instead; yet the plaintiff, being unable to prove a warranty, was afterwards forced to declare in deceit, and recovered 100*l.* damages therein. When maintainable.

To support the action, the plaintiff must prove not only that the vendor made the representation *falsely*, but also that he *knew* it: the falsity of the representation, and the scienter on the part of the defendant, must concur in order to constitute fraud in law.

1. *What false representation will support the action.*

The action may be supported against the vendor, for falsely affirming that he had a title to the goods and a right to sell them, without any express warranty of good title (*e*). So, it lies for selling a counterfeit jewel, knowing it to be such (*f*); or,

(*d*) *Beningsage* v. *Ralphson*, 2 Show. 250.

(*e*) *Crosse* v. *Gardner*, 1 Show. 68; *Turner* v. *Brent*, 12 Mod. 243; S. C. Comb. 142; *Springwell* v. *Allen*, Aleyn, 91, 2 East, 443, n.; *Anon.*, Moore, 467; *Kenrick* v. *Burges*, Moore, 126. See Selw. N. P. 652 (8th Ed.); Bull. N. P. 30.

(*f*) See *Southern* v. *How*, Cro. Jac. 468; S. C. Bridgm. 125; Poph. 143; 2 Rol. 5.

When maintainable.

for selling corrupt wines or victuals (*g*); or, for delivering ashes instead of merchantable commodities (*h*); or, for selling in short and defective measures (*i*). So, deceit will lie, if a merchant sells cloth that he knows to be badly fulled (*k*); or, if a clothier sells bad cloths, upon which he puts the mark of another who makes good cloths (*l*). And if the vendor is guilty of deceit, the plaintiff is not prevented from maintaining the action, although the agreement were, that, if he objected to the chattel, it should be exchanged for another (*m*).

Although action on warranty might not lie.

Again, where the vendor has made false representations, although there may have been a written memorandum of the agreement, in which such representations are not embodied, the purchaser

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(*g*) Rol. Abr. 95; Bac. Abr. *Fraud*, A.; Vin. Abr. *Actions* (P. b) 1.

(*h*) *Beningsage* v. *Ralphson*, 2 Show. 250.

(*i*) *Miles* v. *Dell*, 3 Stark. N. P. C. 23, 25. The plaintiff, however, was nonsuited, because, as the declaration was framed, it only appeared, that the seller had not delivered the whole quantity agreed upon, not that he had fraudulently delivered a less quantity as and for the stipulated quantity.

(*k*) Com. Dig. *Action on the Case for a Deceipt*, A. 8; Vin. Abr. *Actions* (P. b) 1, 2, 3.

(*l*) Com. Dig. *Action*, &c. A. 9; Cro. Jac. 471, and Poph. 144, *per Doderidge*, J.

(*m*) *Wallace* v. *Jarman*, 2 Stark. N. P. C. 162. Lord Ellenborough, C. J. said, that such agreement was collateral: and, if the purchaser was tied down thereby from bringing the action, he might have no remedy; for the vendor might give a worthless article on each successive exchange. And see *Hamer* v. *Alexander*, 2 N. R. 241.

may support an action of deceit (*n*). Thus, where the seller produces a sample at the time of the sale, and falsely represents that the bulk of the commodity is of similar quality, but the sale-note does not refer to the sample, the purchaser may recover for the deceitful representation (*o*); although the evidence would not have been admissible in an action on the warranty. So, where an instrument describes a ship as copper-bolted, but a bill of sale subsequently executed omits the description, though some defect in the first instrument should render it unavailable in an action on the contract, the vendee may use it to show fraud on the part of the seller (*p*). So, where goods are expressly sold "with all faults," the vendor will nevertheless be liable, if he has fraudulently misrepresented the condition at the time, or if he knew of latent defects in the chattel and used artifice to disguise them from the purchaser (*q*). When maintainable.

But it is not every false representation on the part of the seller that will subject him to an action of deceit. "If it appears to be a representation When not.

(*n*) *Dobell* v. *Stevens*, 3 B. & C. 623; S. C. 5 D. & R. 490.

(*o*) *Per* Lord *Ellenborough*, C. J., *Meyer* v. *Everth*, 4 Campb. 23.

(*p*) See the judgment of *Abbott*, C. J., *Kain* v. *Old*, 2 B. & C. 634, 5. *Per Gibbs*, C. J., 4 Taunt. 786.

(*q*) *Fletcher* v. *Bowsher*, 2 Stark. N. P. C. 561; *Schneider* v. *Heath*, 3 Campb. 506. See above, pp. 130, 131.

When maintainable.

in a matter merely *gratis dictum* by the defendant, in respect of which he was under no legal pledge or obligation to the plaintiff for the precise accuracy and correctness of his statement, and upon which therefore it was the plaintiff's own indiscretion to rely; for the consequences of such reliance no action can be maintained"(*r*). Therefore, "if a man having a term for years offer to sell it to another, and says that a stranger would give him 20*l.* for it; by means of which assertion the other buys it, when in truth he was never offered 20*l.* for the term; though he be deceived in the value, yet in truth no action on the case lies"(*s*).

Not, if the purchaser had knowledge.

Again, if the plaintiff was aware of the falsity of the representation, he cannot recover(*t*); as, where a man sells corrupt wine, and the vendee or his servant tastes and approves of it(*u*); for the gist of the action is that the plaintiff was *deceived*, and this cannot be where he had knowledge of the fact. Further, if he had the full means of detecting the fraud and ascertaining the truth, and neglected to inform himself of it, when he might

(*r*) See *per* Lord *Ellenborough*, C. J., *Vernon* v. *Keys*, 12 East, 638 (in which case the action was *by the seller* against the buyer for deceit); S. C. affirmed in error, 4 Taunt. 488.

(*s*) Rol. Abr. 801, pl. 16, adjudged M. 40, and 41 Eliz., B. R. See 1 Sid. 146; *Bayley* v. *Merrel*, Cro. Jac. 386; S. C. 3 Bulstr. 94; *Harvey* v. *Young*, Yelv. 20.

(*t*) *Cowen* v. *Simpson*, 1 Esp. 290; *Scott* v. *Lara*, Peake, 227.

(*u*) Com. Dig. *Action on the case for a Deceipt*, E. 4.

easily have done so, an action of deceit cannot be supported(*x*.) Therefore, deceit does not lie if the vendor affirm falsely of the value; as, if he affirm that jewels are of so much value, when they are not(*y*). So, where a horse is sold, as "sound wind and limb," when it is apparent that he has but one eye(*z*), or where a house is represented to be perfect, when it wants the roof(*a*). So, where the purchaser has full opportunity to inspect the chattel sold, and neglects to do so(*b*). And where the purchaser has omitted to use certain precautions, although the omission may not absolutely amount to such a laches as to bar his right, it may be a question for the jury whether there is not sufficient ground to presume that no deception has in fact taken place(*c*). When maintainable.

2. *Proof of the Scienter.*

Without knowledge on the part of the vendor there can be no fraud; the scienter, therefore, is the gist of the action, and must be averred and proved.

(*x*) 2 Stark. Ev. 268 (2nd Ed.).

(*y*) Com. Dig. *Action on the case for a Deceipt*, E. 4. *Secus*, where the value of the chattel is peculiarly within the vendor's knowledge; as, where he affirms the rent to be worth so much; see *Leakins* v. *Clissell*, 1 Sid. 146; S. C. nom. *Ekins* v. *Treskam*, 1 Lev. 102.

(*z*) 3 Bl. Comm. 166.—Infra.

(*a*) See *Bayley* v. *Merrell*, Cro. Jac. 387.

(*b*) *Pickering* v. *Dowson*, 4 Taunt. 779.

(*c*) *Bowring* v. *Stevens*, 2 C. & P. 337, 341.

Scienter.

Thus, in an old case, where the plaintiff brought an action against the defendant for selling him a stone which he affirmed was a Bezoar-stone, and sold as such, judgment was arrested because the declaration did not allege that the defendant knew it was not a Bezoar-stone (*d*). So, where the action was brought against the vendor for falsely asserting that certain barilla, bargained to be sold, was of such quality that 51 cwt. had produced ten tons of soap, it was held that this was not positive proof of the scienter (*e*). So, in an action against the vendor for falsely selling goods to which he had not good title, it must appear that the defendant knew he had no title (*f*).

Qualified representation.

If the defendant has qualified his representation by stating that he makes it on the authority of another (*g*), or to the best of his own knowledge and belief only (*h*), he will not be liable for the incorrectness of the representation, if it actually was made according to his honest belief. Yet, if he knows his representation to be untrue, although morally he may have been guilty of no fraud, he

(*d*) 1 Sid. 146; *Dowding* v. *Mortimer*, 2 East, 450, n.; 9 B. & C. 932.

(*e*) *Horncastle* v. *Moat*, 1 C. & P. 166.

(*f*) *Medina* v. *Stoughton*, 1 Salk. 211; S. C. 1 Ld. Raym. 1118; *Dale's* case, Cro. Eliz. 44.

(*g*) *Dunlop* v. *Waugh*, Peake, 123; *Jeudwine* v. *Slade*, 2 Esp. 572.

(*h*) *Haycraft* v. *Creasy*, 2 East, 92; *Ashlin* v. *White*, Holt, N. P. C. 389, *per Gibbs*, C. J. See 3 B. & Ad. 124.

will be liable: for there is a difference between fraud in the ordinary sense of the word and fraud in law(*i*). Therefore, wherever the seller must be taken in law to have known that the representation was false; thus, where the sale is by a factor or other agent, and the deceit is not in the merchant but in the factor, the principal will nevertheless be liable(*k*). Scienter.

ASSUMPSIT FOR MONEY HAD AND RECEIVED.

It often becomes a question, whether, upon the breach of the warranty on the part of the vendor, the purchaser is at liberty to recover back the

(*i*) It is now clearly settled, that every wilful falsehood is a fraud in law. If the defendant makes a false representation, *knowing the same to be false*, and the plaintiff thereby receives an injury,—whatever may have been the motive of the defendant in making the false representation, whether it was done to injure the plaintiff, or to benefit himself, or to benefit a third party, or whether it was done wholly gratuitously,—an action lies for the constructive fraud. See *Polhill* v. *Walter*, 3 B. & Ad. 114, 123; *Corbet* v. *Brown*, 8 Bingh. 103; *Foster* v. *Charles*, 6 Bingh. 396, 7 Bingh. 105.

(*k*) *Hern* v. *Nicholls*, Salk. 289; S. C. Holt, 462. For *Holt* C. J., said, the merchant must be answerable for the deceit of his factor, though not *criminaliter*, yet *civiliter*; for, seeing somebody must be a loser by the deceit, it is more reason that he who employs and puts trust and confidence in the deceiver should be a loser, than a stranger. And see *Grammer* v. *Nixon*, 1 Str. 653; *Southerne* v. *How*, Cro. Jac. 468, 471; *Hill* v. *Gray*, 1 Stark. N. P. C. 434; Bull. N. P. 31.

When maintainable.

price. This general rule upon the subject may be laid down;—if the contract be *broken*, the purchaser's remedy is to bring an action for the breach;—if it be *rescinded*, he may recover back the money paid, as on a failure of consideration. Accordingly it is now fully established, that, even where there has been an express warranty at the time of the sale, the mere breach of such warranty does not render it competent for the vendee, after complete acceptance of the goods, to sue for money had and received as on a rescinded contract (*l*): still less is the action maintainable,

(*l*) See *Gompertz* v. *Denton*, 1 Cr. & Mees. 207, and *Street* v. *Blay*, 2 B. & Adol. 456; in the latter case especially the subject seems to have been very fully considered.

The apparent difficulty of reconciling the principal cases is altogether removed, if this plain distinction be kept in view:—that the foundation of the action for money had and received is *a rescission of the contract;* while an action on the warranty is founded, not upon the principle of rescinding the contract, but simply upon the *express and independant undertaking of the vendor.* This distinction seems to be confounded in the argument for the defendant in *Patteshall* v. *Tranter* (4 Nev. & Man. 649), and in the opinion which Lord Ellenborough is reported to have expressed in *Curtis* v. *Hannay* (3 Esp. 83), where his lordship observed, that he took it to be clear law that the purchaser might, on the breach of the warranty, make his election, either to keep the chattel and sue on the warranty, *or return the chattel and bring an action to recover the money paid*; (See 2 B. & Ad. 416).

This general rule, then, may be collected:—that it is never competent for the purchaser (either as plaintiff or defendant) to avail himself of the vendor's breach of warranty, if by so doing he proceeds in effect upon a rescission of the contract. Upon this principle it is, that (with the exceptions mentioned in the

where there has been no warranty, but a mere erroneous representation (without fraud) on the part of the vendor (*m*). When maintainable.

There seem to be four classes of cases in which

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text) an action for money had and received cannot be supported (*a*). So, the breach of warranty cannot be pleaded in bar to an action brought by the vendor for the price (*b*), especially if unequivocal acts of ownership have been exercised (*c*). And applying the same doctrine to an exchange with a warranty, the vendee cannot sue in trover for the chattel delivered by way of barter for another received (*d*). In these cases, indeed, another reason has been given, *viz.* that, as long as the contract remains open, neither an action for money had and received, nor an action of trover, is the proper form of action in which to try a question of warranty (*e*): but, according to the principle of the rule laid down, this is not the true reason; for such actions could not be maintained even if the breach of warranty were admitted.

On the other hand, the purchaser may avail himself of the breach of warranty, whenever by so doing he does not rely upon a rescinding of the contract. Thus, he may bring his counter action for the breach at any distance of time (*f*), notwithstanding that he may have wholly accepted the goods, and afterwards resold them, or exercised any act of ownership whatever: or, he may give the breach of warranty in evidence in reduction of damages, in an action brought by the vendor for the price (*g*).

(*m*) *Early* v. *Garrett*, 9 B. & C. 928.

(*a*) *Gompertz* v. *Denton*, 1 Cr. & Mees. 207; *Weston* v. *Downes*, 1 Dougl. 23; *Power* v. *Wells*, Cowp. 818; *Payne* v. *Whale*, 7 East, 274. See *Cooke* v. *Munstone*, 1 N. R. 351; *Compton's* case, cited by *Buller*, J., 1 T. R. 136.

(*b*) *Street* v. *Blay*, 2 B. & Ad. 456. Supra, p. 268.

(*c*) Id. 264.

(*d*) *Emanuel* v. *Dane*, 3 Campb. 299; *Power* v. *Wells*, 1 Dougl. 24; S. C. Cowp. 818. See 2 B. & Ad. 462.

(*e*) See 3 Campb. 300; Cowp. 819; 7 East, 378.

(*f*) See 1 H. Bl. 19; 4 Nev. & Man. 649.—Infra.

(*g*) See 2 B. & Ad. 462, 464. Supra, p. 268, 9.

When maintainable.

the vendor's breach of warranty will enable the purchaser to treat the contract as rescinded, and to bring assumpsit for money had and received.

Original stipulation.

1. The action may be maintained, where there was *a stipulation in the original agreement*, that, in the event of the failure of the original consideration, the contract should be rescinded. Thus, where the plaintiff purchased a chaise from the defendant for ten guineas, on the condition, that, if the plaintiff's wife should not approve of it, the chaise was to be returned, and the contract instead of a contract of sale was then to be considered a contract of hiring, it was held—the plaintiff's wife having signified her disapproval, and the defendant having tendered back the chaise, with the hire for the time it had been kept,—that an action for money had and received was maintainable(*n*).

Subsequent consent.

2. Although there may have been no condition in the original contract authorizing the return, the action may still be supported where the vendor has *subsequently consented to rescind* the contract, either by express offer to receive back the chattel(*o*), or by tacit acquiescence when the

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(*n*) *Towers* v. *Barrett*, 1 T. R. 133. And see *per Ashurst*, J., 1 Dougl. 24; *per Bayley*, B., 1 Cr. & Mees. 208.

(*o*) See *per Bayley*, B., 1 Cr. & Mees. 208; *Long* v. *Preston*, 2 M. & Payne, 262; *Linley* v. *Bates*, 2 Tyrw. 753.

chattel is tendered(*p*). But where there had been a warranty of soundness at the time of the original contract, and in a subsequent conversation the vendor offered to take back the chattel and return the money *if it should be proved to be unsound*, it was held that the plaintiff was bound to bring his action upon the warranty, and could not recover in an action for money had and received(*q*). It has been said(*r*), that this decision proceeded upon the ground that the subsequent conversation formed no part of the original contract: but the true ground of the decision clearly appears to be, that the subsequent offer was no abandonment of the original undertaking, and that, as the question of the warranty broken or not broken still remained to be discussed, this was not the proper form in which to try it; for the action ought to be brought in such a shape as to give the defendant proper notice(*s*). When maintainable.

3. The action may be maintained *as long as the contract is executory* only, and no complete acceptance has taken place on the part of the vendee. Thus, it was said by Lord Tenterden, C. J.(*t*), Executory contract.

(*p*) See *per Willes*, J., 1 T. R. 135; *Davis* v. *Street*, 1 C. & P. 18. See *Roper* v. *Shevely*, 1 Cr. & Mees. 497.

(*q*) *Payne* v. *Whale*, 7 East, 274.

(*r*) 1 Dougl. 24, n.

(*s*) See the judgment of Lord *Ellenborough*, 7 East, 278, 9.

(*t*) Delivering the judgment of the Court in *Street* v. *Blay*, 2 B. & Ad. 463. See *Okell* v. *Smith*, 1 Stark. N. P. C. 107.

When maintainable.

that, "where an article is ordered from a manufacturer who contracts that it shall be of a certain quality, or fit for a particular purpose, and the article sent as such is never completely accepted by the party ordering it: in this, and in similar cases, the latter may return it as soon as he discovers the defect, provided he has done nothing more in the meantime than was necessary to give it a fair trial" (*u*).

Fraud.

4. Lastly, where the purchaser can establish a case of *actual fraud*, he will be entitled to rescind the contract, and sue in assumpsit for money had and received to recover back the price (*x*); as, where a valuable commodity is bargained for, and

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(*u*) *Giles* v. *Edwards*, 7 T. R. 181; *Clarke* v. *King*, Ry. & Moo. 394; S. C. 2 C. & P. 286; *Wright* v. *Newton*, 2 Cr. Mees. & R. 124; *Lowry* v. *Bourdieu*, 2 Dougl. 471, *per Buller*, J. The principle of this distinction appears to be, that, as long as the contract is executory, compliance with the warranty is *quasi a condition precedent*. Such a case, however, can scarcely often occur: for, generally speaking, by payment of the price the property passes to the purchaser, and the contract ceases to be executory; and it is only when the price has been paid that the question can arise.

An analogous distinction is taken in respect of cases, where money has been paid with a view to an illegal contract. As long as the contract remains executory, the money may be recovered back, (*Tappenden* v. *Randall*, 2 B. & P. 467, *Aubert* v. *Walsh*, 3 Taunt. 277); but after it is executed, the money cannot be recovered, (*Howson* v. *Hancock*, 8 T. R. 575).

(*x*) See *Steward* v. *Coesveldt*, 1 C. & P. 23. See above, p. 129.

the vendor furnishes a quantity of rubbish instead (*y*). When maintainable.

Parallel to the case of fraud, is the case of payment by the purchaser, through *mistake*, of a greater sum than he ought to have paid. Thus, where the plaintiff agreed to buy a bar of silver, and to make payment according to the value expressed in the assay-master's certificate, it was held—an over-valuation having been accidentally made, and an excessive payment having taken place in consequence of the mutual error—that the plaintiff might rescind the contract, and maintain an action against the vendor for money had and received (*z*). Le Blanc J. said, that it was true, as a general rule, that, when an article is sold which turns out to be of less value than the price given, the extra price, if there be no fraud, cannot be recovered back; yet, that the rule applied only to cases where the thing was of arbitrary value (*a*.) Mistake.

However, even where there has been actual fraud, the purchaser, by adopting the contract after discovering the fraud, may preclude himself from rescinding it and recovering back the money paid (*b*); although, had it not been completed, no Waiver of fraud.

(*y*) *Fortune* v. *Lingham*, 2 Campb. 417; *per* Lord *Ellenborough*, C. J.

(*z*) *Cox* v. *Prentice*, 3 M. & S. 344. See *Milnes* v. *Duncan*, 6 B. & C. 671.

(*a*) 3 M. & S. 349.

(*b*) *Campbell* v. *Fleming*, 3 Nev. & Man. 834; S. C. 1 Ad. & Ell. 40. *Semble*, the rule is not altered even though the pur-

Fraud.

action could have been sustained by the vendor to enforce performance (*c*).

ACTION ON WARRANTY.

Where the purchaser relies on a warranty, and the gist of the action is the breach of the undertaking, whether express or implied, he may frame his action either in assumpsit or in tort (*d*). To support his case, in either form of action, he must prove; 1st, the contract of warranty; 2ndly, the breach; 3rdly, the damages which he has sustained.

I. PROOF OF THE WARRANTY.

1. *Express Warranty.*

Every affirmation made by the vendor at the time of the sale amounts to a warranty, provided

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chaser have afterwards discovered an additional incident in the fraud; See the observations of the judges, *ibid.*

(*c*) 3 Nev. & Man. 837, *per Patteson*, J.

(*d*) The ancient method of declaring was in tort, laying the gravamen not on the deceit but on the warranty broken; and as the gist of the action was the breach of the contract, the scienter though alleged was unnecessary to be proved; see below, p. 349. But since the case of *Stuart* v. *Wilkins*, (1 Dougl. 18), which first established the mode of declaring in assumpsit, the latter has been adopted in modern practice for the convenience of adding the money counts; (see 2 East, 448, 451; Selw. N. P. 657; Doug. 20, n.) It seems, however, to be quite immaterial now whether the form of action be *ex contractu* or *ex delicto*, as the plaintiff can no longer avail himself of the money counts. (See a declaration

it appear in evidence to have been so intended (*e*). It is not necessary that the words "warrant," or "warranty," should be used (*f*): thus, it was held, that a representation made by a seller in the course of a conversation relating to the contract, that the buyer "might depend upon it that the horse was perfectly quiet and free from vice," was held to amount to a warranty (*g*). And a declaration by the defendant, that he "*could* warrant" the chattel sold, is equivalent to an express undertaking (*h*). So, a bare affirmation by the seller, that the chattel is his own, amounts to a warranty of the title (*i*). So, even if the defendant expressly declined to war- Express warranty.

in case for breach of warranty, 1 Ad. & Ell. 508.) An obvious distinction may be noticed in respect of the effect of the general issue in each form of action. The plea of *non assumpsit* would clearly put in issue the warranty, and not the breach; while the plea of *not guilty* would admit the warranty, but deny the breach. (See Rules Hil. T. 4 Will. IV., *Assumpsit* and *Case*. And see above, pp. 284, 5, and 317, note (*g*).

(*e*) See *per Buller*, J., 3 T. R. 57; *per Bayley*, J., 4 C. & P. 46.

(*f*) 3 Man. & Ry. 4; 1 Stark. N. P. C. 505.

(*g*) *Cave* v. *Coleman*, 3 Man. & Ry. 2.

(*h*) *Button* v. *Corder*, 7 Taunt. 405.

(*i*) *Medina* v. *Stoughton*, 1 Salk. 210; S. C. Holt, 208. It is said in Holt and Salkeld that the chief justice took the distinction, that such affirmation amounted to a warranty only when the seller was in possession at the time; for if the seller be out of possession, then there is room to question his title. But the distinction has been doubted (3 T. R. 57, 58, *per Buller*, J.); and it is not adverted to in the report of the case, 1 Ld. Raym. 593. See Bull. N. P. 30; 1 Salk. 211, n.; *Robinson* v. *Anderton*, Peake, 94.

Express warranty.

rant, but affirmed that he "believed the chattel to be sound," the purchaser may declare as upon a warranty that the chattel was sound to the best of the vendor's knowledge (*k*).

Proof.

The undertaking by the vendor may be proved by a receipt, containing the terms of the warranty, and signed by the vendor (*l*); or, by the invoice or bill of parcels in which the goods are stated to be of a particular quality or description (*m*). It is sufficient if the warranty is acknowledged in a subsequent letter written by the defendant to the plaintiff, referring to his representations made at the time of the sale (*n*). But if the plaintiff attempts to show that a document, which contains the alleged warranty, is part and parcel of the original contract, he must establish a distinct connection between them: thus, where the agreement was, to deliver a vessel and stores *according to the inventory*, and it appeared that the sellers had carefully endeavoured to make a distinction between the description and the enumeration, both of which were contained in an advertisement, it was held, that the whole description contained in the advertisement could not have been intended to be embodied in the agreement, but that the word

(*k*) *Wood* v. *Smith*, 5 Man. & Ry. 124; S. C. M. & Malk. 539.

(*l*) *Skrine* v. *Elmore*, 2 Camp. 407; see 7 Bingh. 574.

(*m*) *Bridge* v. *Wain*, 1 Stark. N. P. C. 504.

(*n*) *Salmon* v. *Ward*, 2 C. & P. 211.

"inventory" was to be taken in its ordinary sense, and referred only to the enumeration (*o*). Express warranty.

But it is not every representation on the part of the seller which will constitute an undertaking on which he will become legally liable. Mere vague expressions used by the seller at the time of the sale will not amount to a warranty; "for every one in selling of his wares will affirm that his wares are good" (*p*): and the rule is, therefore, that *simplex commendatio non obligat.* "A seller is not liable if he merely makes use of those expressions which are usual to sellers, who praise at random the goods that they are desirous to sell; for the buyer ought not to have relied upon such vague assertions" (*q*). And no action can be maintained, where the seller did not intend to give an absolute warranty, but merely to express an opinion; therefore, where the defendant inserted in the catalogue of sale the name of a celebrated artist as the painter of a particular picture, which was proved not to be the fact, but no fraud was imputed, he was held not liable (*r*). So, where the vendor, in the sale of a horse, declared that he knew nothing further of him than he gathered from the pedigree What representations do not amount to warranty.

(*o*) *Freeman* v. *Baker*, 2 Nev. & Man. 446.

(*p*) *Chandelor* v. *Lopus*, Cro. Jac. 4; *Arnott* v. *Hughes*, 1812, M. S. cited Chit. Contr. 359 (2nd Ed.).

(*q*) Sugd. Vend. p. 3.

(*r*) *Jendwine* v. *Slade*, 2 Esp. 572.

Express warranty.

which he received from the former owner, it was held, that the vendor was not liable, though the age was falsely stated in the pedigree (*s*). So, where the horse sold was warranted sound, and represented to be of a certain age, it was held that the vendor did not intend to warrant the age (*t*).

When made.

The warranty of the seller must be *at the time* of the sale, and not *afterwards* (*u*); for a subsequent warranty, although express, is void for want of consideration, neither does the buyer then take the goods upon the credit of the seller's assertion (*x*). And if there is a written memorandum of the contract subsequently drawn up, containing the alleged warranty, and no express evidence of warranty on the occasion of making the bargain, it is a question for the jury whether the warranty formed part of the original contract, or whether the insertion was merely an after-thought (*y*). But it will be intended, unless the contrary appear on the declaration, or be made to appear in evidence, that the warranty and the contract were made at the same time (*z*).

(*s*) *Dunlop* v. *Waugh*, Peake, 123.

(*t*) *Budd* v. *Fairmaner*, 5 C. & P. 78; S. C. 8 Bingh. 48.

(*u*) *Crosse* v. *Gardner*, Holt, 5; *Pope* v. *Lewyns*, Cro. Jac. 630. See 2 Ld. Raym. 1120; Dyer, 76 a.

(*x*) 3 Bl. Comm. 166; Finch, L. 189.

(*y*) *Fairmaner* v. *Budd*, 7 Bingh. 574; S. C. 5 M. & Payne, 534.

(*z*) *Moor* v. *Russell*, Skinn. 104; S. C. (nom. *Mew* v. *Russel*,) 2 Show. 284. See *Howlet's* case, Latch, 150.

But a warranty made *before* the sale is good; as, where the seller warrants the chattel and fixes the price, and then the buyer takes time to consider for two or three days, and afterwards comes and gives the seller his price(*a*). So, a prospective warranty, as that a horse shall be sound at a future period, is valid (*b*). But if the purchaser relies on a warranty given on a prior occasion, he must distinctly connect it with the subsequent contract, and show that the representation was intended to be continuing; therefore, a warranty upon a contract of sale which is afterwards broken off, will not extend to a subsequent bargain of sale of the same chattel(*c*). Again, if a written memorandum of the contract of sale be drawn up, the buyer cannot give evidence of prior representations by

Express warranty.

(*a*) *Per Holt*, C. J., *Lysney* v. *Selby*, 2 Ld. Raym. 1120.

(*b*) *Liddard* v. *Kain*, 2 Bingh. 183. And see *per* Lord *Mansfield*, C. J., in *Eden* v. *Parkison*, 2 Dougl. 735: "There is no doubt but you may warrant a future event." So in Com. Dig. *Action on the Case for a Deceipt* (A. 11), it is said, that warranty may extend to a future time, as that sheep are sound and shall continue so for a year. See Vin. Abr. *Actions*, (A. c.), 1, citing *King* v. *Brayne*, Trin. 39 Eliz. B. R. But it is otherwise laid down by Blackstone (3 Com. 166): "Also the warranty can only reach to things in being at the time of the warranty made, and not to things *in futuro*: as, that a horse *is* sound at the time of buying of him, not that he *will be* sound two years hence."

(*c*) *Anon.*, 1 Stra. 414; Dyer, 76 a; see Cro. Jac. 197. So, in Com. Dig. *Action for Deceipt* (A. 11): The warranty must be made upon the bargain; therefore, if a man affirm himself owner, and sell seven days afterwards, deceit does not lie upon this affirmance.

Express warranty.

the vendor by way of warranty; though an action might lie for the deceit. Thus, if a representation of quality has been made by the seller before the sale, and a subsequent written agreement does not refer to such representation, the buyer cannot recover on the ground that the chattel does not accord with the representation (*d*). So, the plaintiff cannot recover on an undertaking of the defendant that the goods shall accord with a sample exhibited, if there is a sale-note which is silent as to the sample (*e*): and, conversely, where the sale is by sample, this excludes evidence of any warranty, other than that the bulk and sample shall correspond (*f*). So, where an instrument describing the vessel sold as "copper-bolted" was invalid under the register-acts, and a bill of sale was afterwards executed in which this description was not contained, it was held, that the bill of sale was the only proof of the contract, and that the plaintiff therefore could not recover on the ground that the ship was not copper-bolted (*g*).

(*d*) *Pickering* v. *Dowson*, 4 Taunt. 779. It is said, that, "where the whole matter passes in *parol*, all that passes may sometimes be taken together as forming part of the contract: though not always, because matter talked of at the commencement of a contract may be excluded by the language used at the termination;" 2 B & C. 634; 5 Bingh. 543.

(*e*) *Meyer* v. *Everth*, 4 Campb. 22; *Gardiner* v. *Gray*, 4 Campb. 144; *Tye* v. *Fynmore*, 3 Campb. 462; *Hope* v. *Atkins*, 1 Price, 143.

(*f*) *Parkinson* v. *Lee*, 2 East, 314.

(*g*) *Kain* v. *Old*, 2 B. & C. 627

Express warranty.

If an agent, or servant, to whom the vendor has entrusted the chattel to be sold, gives a warranty to the purchaser at the time of the contract, the principal will be bound; thus, if a master sends his servant with a horse and gives directions about the sale, the servant thereby becomes the accredited agent of his master, and his representation at the time of the sale is evidence as part of the transaction (*h*). So, it is said in Viner, if the servant of a taverner sells wine to another, which is corrupted, an action lies against the master, though he did not command his servant to sell it to this particular person (*i*). The authority to warrant is implied from the general authority to sell the chattel; and it is not necessary to give evidence of special instructions to that effect (*k*). Yet, if the agent had a special authority, and in giving a warranty to the purchaser exceeds that authority, the principal will not be bound (*l*). A distinction, indeed, has been taken between horse-dealers and others: it is said, that, if a horse-dealer sends his servant to sell, and the servant contrary to his instructions warrants, the horse-dealer would be bound; but a private

By agent or servant.

(*h*) See *per* Lord *Ellenborough*, C. J., 5 Esp. 74. And further, as to the express and implied authority of the agent, *supra*, p. 215.

(*i*) Vin. Abr. *Actions* (S. b.), 3.

(*k*) *Alexander* v. *Gibson*, 2 Campb. 555; *Runquist* v. *Ditchell*, 3 Esp. 64; S. C. 2 Campb. 556, n.

(*l*) *Fenn* v. *Harrison*, 4 T. R. 177. See 3 T. R. 757; 1 Esp. 112; 2 Cr. & Mees. 392; Paley, Pr. & A. 204, 209.

Express warranty.

person would not be bound by the unauthorized warranty of an agent or servant (*m*).

Warranty by agent must be at the time of the sale.

To bind the vendor-principal the warranty of the agent must have been made at the time of the sale (*n*); therefore, where at the time of making the representation nothing was said as to price, it was held, that, as the contract was not then completed, the statement by the agent did not constitute a warranty (*o*). And if there has been a previous bargain between the vendor and purchaser, in which nothing is said about warranty, the vendor will not be bound by subsequent statements of the servant or agent who was entrusted to deliver the chattel (*p*). So it is, where the vendor has given a warranty originally, and the agent, without authority, alters the terms of the warranty (*q*). On the same principle, in sales by auction, where there are written or printed particulars of sale, the subsequent statements of the auctioneer, contradicting or varying the particulars, will not bind the principal (*r*).

(*m*) See *per* Lord *Eldon*, Ch., in *Bank of Scotland* v. *Watson*, 1 Dow. 45; and *per Bayley*, J., in *Pickering* v. *Busk*, 15 East, 45.

(*n*) See 7 Bingh. 574. For, as it has been already stated, p. 338, the warranty of the vendor himself must be at the time of the contract.

(*o*) *Helyear* v. *Hawke*, 5 Esp. 72. See *Peto* v. *Hague*, 5 Esp. 135; Phil. Ev. 99.

(*p*) *Woodin* v. *Burford*, 2 Cr. & Mees. 391.

(*q*) *Strode* v. *Dyson*, 1 Smith, Rep. 400.

(*r*) *Shelton* v. *Livius*, 2 Cr. & Jer. 411. See the cases cited above, p. 153, note (*b*).

Express warranty.

The plaintiff must, in general, prove the contract and the warranty according to the allegations in the declaration.

Variance in proof.

Thus if part of the consideration be omitted, it is a fatal variance; as, where two horses were sold by one entire bargain, the warranty extending to both, and the purchaser declared on the sale of one(*s*). So, where the contract was, that the plaintiff should purchase the horse for £55, part of which was to be returned on a contingency, and the purchaser declared on an absolute contract to purchaser for £55, it was held a variance(*t*). So, where, on the exchange of two horses, the parties mutually gave a warranty of soundness, the plaintiff was nonsuited because he had not alleged in his declaration that he had warranted his own horse sound; such warranty forming a part of the consideration for the defendant's undertaking(*u*). But if the consideration was in effect the same as that declared upon, it is sufficient: therefore, where the agreement was, that the plaintiff should give thirty guineas for the horse, and that the defendant should purchase a horse from the plaintiff's brother for fourteen

(*s*) *Symonds* v. *Carr*, 1 Campb. 361; S. P. *Hart* v. *Dixon*, Selw. N. P. 104. It is immaterial whether the action was laid in assumpsit or in tort, *Weall* v. *King*, 12 East, 452.

(*t*) *Blyth* v. *Bampton*, 3 Bingh. 472. See *Durston* v. *Tuthan*, cited 3 T. R. 67. See above as to Variance, p. 223.

(*u*) *Cross* v. *Bartlett*, 3 M. & Payne, 537.

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guineas, *the difference only to be paid by the plaintiff*, it was held that this might be declared upon as an agreement to purchase for thirty guineas; since the parties agreed to consider the second horse as fourteen guineas in their mode of reckoning the payment(*x*). So, where the consideration was stated to be sixty guineas, but the bargain proved was, that the plaintiff should give that sum, "and, if the horse was lucky, £5 more or the buying of another horse," it was held to be no variance; because the substantial and operative part of the consideration was sufficiently alleged, and the additional item was too vague to constitute a legal obligation(*y*).

When the allegation is sufficient.

In stating the terms of the warranty and the extent of the undertaking, it is sufficient if the plaintiff set forth in his declaration those parts which are relevant to the breach(*z*). "It is a very different thing whether the plaintiff state truly those parts of a contract the breach of which he complains of, though other parts not material to the question be not stated; or, whether he state any part of it untruly: for then it appears to be a different contract"(*a*). If the warranty be

(*x*) *Hands* v. *Burton*, 9 East, 349; S. P. *Brown* v. *Fry*, Selw. N. P. 632 (8th Ed.).

(*y*) *Guthing* v. *Lynn*, 2 B. & Ad. 232; *Cave* v. *Coleman*, 3 Man. & Ry. 2.

(*z*) *Miles* v. *Sheward*, 8 East, 7. See *per Abbott*, C. J., 4 B. & A. 391. Supra, p. 226.

(*a*) *Per Lawrence*, J., 8 East, 9.

stated inaccurately, it will be a variance: therefore, where the plaintiff declared on a general warranty of a horse, and the proof was of a warranty in every respect *except a kick on the leg*, it was held fatal(*b*); although the breach complained of was, that the horse had the dropsy, and was unsound in other respects unconnected with the lameness. This case, however, has been disapproved of; and, in a late case similar in circumstances, where a general warranty was declared upon, whereas it appeared in proof to have been a qualified one, but the qualification was not involved in the alleged breach, Alderson B. allowed an amendment(*c*). Express warranty.

2. *Implied Warranty.*

The maxim *caveat emptor* applies to the purchaser; therefore, to charge the vendor, the undertaking must be express, and in general a warranty will not be implied in law in the sale(*d*) or exchange(*e*) of a chattel. An opinion formerly prevailed that a warranty might be presumed from the extent of the price given; but this has long been exploded(*f*). Accordingly, although a fair mer- Implied warranty in what cases.

(*b*) *Jones* v. *Cowley*, 4 B. & C. 445; S. C. 6 D. & R. 533. See *Morris* v. *Lithgoe*, 2 Smith, Rep. 395.

(*c*) *Hemming* v. *Parry*, 6 C. & P. 580.

(*d*) *Baglehole* v. *Walters*, 3 Campb. 154.

(*e*) *La Neuville* v. *Nourse*, 3 Campb. 351.

(*f*) 2 East, 322.

Implied warranty.

chantable price have been given, the law will raise no implied warranty that the goods shall be of merchantable quality(*g*).

There are some cases, however, in which the law will imply a warranty: thus, it should seem that in every contract of sale it is an implied condition, unless the contrary be expressed(*h*), that the seller can make out a good title to the chattel sold(*i*).

Good title.

(*g*) *Parkinson* v. *Lee*, 2 East, 314. See 8 Campb. 351.

(*h*) See *Spratt* v. *Jeffery*, 10 B. & C. 249.

(*i*) *Robinson* v. *Anderton*, Peake, 94; *Peto* v. *Blades*, 5 Taunt. 657; *Crosse* v. *Gardner*, Carth. 90; S. C. 1 Show. 68, Comb. 142, 3 Mod. 261; *Furnis* v. *Leicester*, Cro. Jac. 474. So it is laid down by Blackstone (2 Com. 451): "A purchaser of goods may have a satisfaction from the seller, if he sells them as his own, and the title proves deficient, without any express warranty for that purpose." And in 3 Com. 166:—"In contracts for sales, it is constantly understood that the seller undertakes that the commodity he sells is his own; and if it proves otherwise, an action on the case lies against him to recover damages for this deceit." Acc. Com. Dig. *Action on the Case for a Deceipt*, (A. 8). But see *Early* v. *Garrett*, 9 B. & C. 932, *per Littledale*, J.; *Medina* v. *Stoughton*, 1 Salk. 110; *Springwell* v. *Allen*, Aleyn, 91; and 2 East, 443, n.; *Turner* v. *Brent*, 12 Mod. 245; *Dale's* case, Cro. Eliz. 44. The older cases in general seem to assume that there is no implied warranty of good title: but probably this may have been because the only two species of actions of this nature, formerly recognised, were, an action on an express warranty, and an action for deceit—the latter requiring knowledge on the part of the vendor.

It has been recently determined, that, in a contract for the sale of the unexpired residue of a term, there is an implied undertaking to make out the lessor's title to demise, as well as that of the vendor to the lease itself; *Souter* v. *Drake*, 5 B. & Ad. 992,

Implied warranty.

Again, a warranty may be presumed from the non-compliance of an usage of trade to specify certain defects. Thus, where it was proved to be a custom of trade, in the sale of pimento (and other drugs), if sea-damaged, to express this in the catalogue of sale, it was held that the defendant, who had sold a quantity of sea-damaged pimento without notifying the deterioration, was liable to the purchaser, and that the implied contract was in effect a sale of the drugs, as and for drugs that were not sea-damaged (*k*). So, where sheep were sold as "stock," and by the custom of the trade "stock" were understood to be sheep that were sound, this was held to amount by implication to a warranty of soundness (*l*).

By usage of trade.

Chattel sold for specific purpose.

Again, in every contract to supply a manufactured article for a particular purpose, there is an implied warranty that it will answer the purpose to which it is to be applied. "The law resolves itself into this, that, if a man sells gene-

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1002; S. C. 3 N. & M. 40. The cases of *Gwillim* v. *Stone*, 3 Taunt. 433, *George* v. *Pritchard*, Ry. & Moo. 417, contra, cannot be supported; See 5 B. & Ad. 1000, 1002. And see *Purvis* v. *Rayer*, 9 Price, 488; S. C. 1 Sugd. Vend. 335, (9th Ed.). It should seem that *à fortiori* a warranty of title ought to be implied in sales of chattels personal; for the reason formerly given for the rule that there was no implied warranty in the sale of an estate was, that the purchaser might inspect the title-deeds and satisfy himself as to the title. See a MS. note in 3 T. R. 57, in Lincoln's Inn Library.

(*k*) *Jones* v. *Bowden*, 4 Taunt. 847.

(*l*) *Anon.* cited by *Heath*, J., 4 Taunt. 853.

Implied warranty.

rally, he undertakes that the article sold shall be fit for *some* purpose; if he sells it for a particular purpose, he undertakes that it shall be fit for that *particular* purpose"(*m*). Therefore, where copper was sold for the purpose of sheathing a ship, and the defendant undertook "to supply the purchaser well," it was held that the plaintiff might recover on an implied warranty; the copper supplied under the contract being proved to have been utterly unserviceable, and to have lasted only four months, instead of four years, the average duration(*n*). On the same principle, where the commodity is purchased for the purpose of sale, it is an implied condition that it shall be saleable(*o*); especially where it is intended to be shipped for a foreign market, and the purchaser has no opportunity of inspection(*p*).

How declared upon.

But where the purchaser relies upon such implied warranty, he ought to frame his declaration accordingly. Thus, where the plaintiff declared on a general warranty, that certain plates of copper-

(*m*) *Per Best*, C. J., 5 Bingh. 546. See 4 B. & C. 115; *Laing* v. *Fidgeon*, 6 Taunt. 108; *Gray* v. *Cox*, 1 C. & P. 186.

(*n*) *Jones* v. *Bright*, 5 Bingh. 533; S. C. Dan. & Lloyd, Merc. Ca. 304. *Abbott*, C. J., said that there was some diversity of opinion on the subject; See 4 B. & C. 115.

(*o*) *Gardiner* v. *Gray*, 4 Campb. 144: *Holcombe* v. *Hewson*, 2 Campb. 391. See *Bridge* v. *Wain*, 1 Stark. N. P. C. 504; *Cooper* v. *Twybill*, 3 Campb. 286, n. See Cro. Jac. 197.

(*p*) *Laing* v. *Fidgeon*, 4 Campb. 169. See id. 144.

sheathing supplied by the defendant should be of good, sound, substantial and serviceable quality, and the proof was, that there had been no express warranty, but that the copper had been sold at the market-price as "sheathing-copper" for coppering a ship,—it was held, that, although the copper was proved to have been utterly unserviceable and unfit for the purpose required, the plaintiff could not recover, as a general warranty could not be intended to arise from such a contract (*q*). Implied warranty.

II. THE BREACH.

In an action on an express warranty, it is immaterial whether the seller was ignorant or cognizant of the defect; therefore, if a man warrants a horse, he does so at his own peril, if the horse was unsound at the time of the sale, though he knew it not (*r*). And even if it be alleged in the declaration that the vendor was aware of the defect, the allegation is immaterial and need not be proved; whether the action be laid in assumpsit or in case (*s*): but if no express warranty is relied on, Breach.

(*q*) *Gray* v. *Cox*, 4 B. & C. 108; S. C. 6 D. & R. 200.

(*r*) *Anon.* Lofft, 146. For the rule is, that, either express warranty without knowledge, or knowledge without warranty, will make the vendor liable. See 1 Dougl. 21, n.

(*s*) *Williamson* v. *Alison*, 2 East, 146; *Gresham* v. *Postan*, 2 C. & P. 540; *Anon.* v. *Purchase*, cited 2 East, 448; *Denison* v. *Ralphson*, 1 Ventr. 366, *per Curiam*.

Breach.

and the plaintiff sues in an action for the deceit, the *scienter* being the gist of the action, must be both charged and proved(*t*).

In considering the proof necessary to support the breach, the *extent* of the warranty becomes a matter of inquiry; and this may be narrowed by either express or implied qualification.

I. *Extent—generally.*

1. *Express Qualification.*

When the warranty is qualified in respect of the subject warranted, or in respect of the time to which it extends, the vendor will not be liable beyond.

Qualification as to SUBJECT-MATTER.

Thus, in the following warranty:—"To be sold, a black gelding, five years old; has been constantly driven in the plough; warranted:"—it was held that the warranty extended to soundness only, and not to age(*u*) And a similar decision was given, where the warranty was contained in a receipt as follows:—"Received of J. S. (the plaintiff) £10 for a grey four-years' old colt, warranted sound in every respect:"—the age being

(*t*) *Dowding* v. *Mortimer*, 2 East, 450, n.; *Horncastle* v. *Moat*, 1 C. & P. 166.—Supra.

(*u*) *Richardson* v. *Brown*, 1 Bingh. 344; S. C. 8 B. Moore, 338.

held to be mere matter of description (*x*). So, where a horse is sold with a warranty of soundness, and a representation of the place from which he came, it will be sufficient if he answers the general warranty of soundness, though the place be misdescribed (*y*). On the same principle, where the seller declines to warrant, further than expressing his own opinion, he will only be liable on a warranty that the chattel is sound to the best of his knowledge and belief (*z*); or, where he represents it according to a written description which he himself has received, but for the truth of which he does not vouch, he is not liable if the written description be false (*a*). Breach.

However, where the defendant relies on a subsequent condition qualifying and limiting the warranty, he must distinctly show the connection (*b*), and that the qualification related to the whole warranty, or at least to the particular breach complained of (*c*). And the qualification must consist with the general terms of the undertaking: thus, where a ship was warranted "copper-fastened," but by the agreement the purchaser was to take

(*x*) *Budd* v. *Fairmanner*, 8 Bingh. 48; S. C. 1 M. & Sc. 74.
(*y*) *Per* Lord *Eldon*, Ch., *Geddes* v. *Pennington*, 5 Dow, 164.
(*z*) *Wood* v. *Smith*, 5 Man. & Ry. 124; S. C. M. & Malk. 539.
(*a*) *Dunlop* v. *Waugh*, Peake, 123.
(*b*) *Best* v. *Osborne*, 2 C. & P. 74.
(*c*) *Buchanan* v. *Parnshaw*, 2 T. R. 745.

Breach.

her "with all faults," it was held nevertheless that the vendor was liable on his warranty, the vessel being proved to be only partially copper-fastened (*d*); since the agreement to take a chattel "with all faults" must be understood to mean, with all faults which it may have consistently with its being the thing described (*e*).

Qualification as to time.

Again, where the vendor has expressly restricted his liability on his warranty, to a certain period of time, he will be discharged after such period has elapsed; as, where on the sale of a horse a warranty of soundness is given, to continue in force for twenty-four hours only (*f*), or, until a reasonable trial has been exercised by the purchaser (*g*). In the absence, however, of such a limitation, the vendor will be liable at any time after the sale, provided that the unsoundness existed, though undetected, at the time of the warranty (*h*). And if the vendor relies on a condition restricting the time of taking advantage of the breach, he must give specific proof to this effect (*i*), and that the

(*d*) *Shepherd* v. *Kain*, 5 B. & A. 240.

(*e*) 5 B. & A. 241.—Supra.

(*f*) *Bywater* v. *Richardson*, 1 Ad. & Ell. 508, 514. See 3 Esp. 271.

(*g*) *Adams* v. *Richards*, 2 H. Bl. 573.

(*h*) See 8 Bingh. 454; Ry. & Moo. 137, 8. It is sufficient to charge the vendor if the *cause* existed at the time of the bargain; see below, p. 359, n.

(*i*) *Buchanan* v. *Parnshaw*, 2 T. R. 745.

condition was part of the sale(*k*), and that the plaintiff had notice thereof (*l*). Although the vendor is not liable on a general warranty for defects arising subsequently, and not existing at all at the time of the sale(*m*), yet it would seem that a liability may arise upon a warranty, which, by express agreement, is prospective, and contemplates defects not *in esse* at the time of the contract(*n*). Breach.

2. *Implied Qualification.*

A general warranty will not be held to extend to defects or blemishes visible to a common observer. Tindal C. J. observed, that "the older books lay it down, that defects apparent at the time of the bargain are not included in a warranty however general, because they can form no subject of deceit or fraud; and originally the mode of proceeding on a breach of warranty was by an action of deceit grounded on a supposed fraud: a party, therefore, who should buy a horse, knowing it to be blind in both eyes, could not sue on a Implied qualification. Visible defects.

(*k*) *Best* v. *Osborne*, 2 C. & P. 74; S. C. 1 Ry. & Moo. 296; 1 C. & P. 632.

(*l*) See 1 Ad. & Ell. 508, 510; *Mesnard* v. *Aldridge*, 3 Esp. 271.

(*m*) *Bluett* v. *Osborne*, 1 Stark. N. P. C. 384; *Geddes* v. *Pennington*, 5 Dow, 160, 164; *Eaves* v. *Dixon*, 2 Taunt. 343; see 8 Bingh. 457.

(*n*) See above, p. 339.

Breach.

general warranty of soundness"(*o*). Thus, where a visible defect was disclosed to the plaintiff at the time of the contract, and was the cause of a material reduction of the price set upon the chattel, it was held that this could not be included in a general warranty of soundness (*p*). The ground of this decision, and of the general doctrine, seems to be, that, where the defect is patent, *the buyer is presumed to have been aware of it*, unless the contrary appear, and therefore that it cannot be intended that such defect was *meant by the parties themselves* to be included in the warranty (*q*); not that the vendee is barred on account of his own laches in neglecting to examine and ascertain whether such obvious defect existed. Accordingly, where the plaintiff declared on a warranty that the horse sold by the defendant should be sound wind and limb, and averred that the horse had but one eye &c., and it was objected in arrest of judgment that the want of an eye was a visible thing, whereas the warranty extended only to secret infirmities, the Court nevertheless gave judgment for the plaintiff, because *the jury had found that the defendant did warrant* (*r*).

(*o*) 7 Bingh. 605; and see *Dyer* v. *Hargrave*, 10 Ves. Jun. 507, *per* Sir *W. Grant*, M. R.

(*p*) *Margetson* v. *Wright*, 5 M. & Payne, 606, S. C. 7 Bingh. 603.

(*q*) See 2 Stark. Ev. 905, note (*u*), (2nd Ed.).

(*r*) *Butterfeild* v. *Burrows*, 1 Salk. 211.

Breach.

Again, where the peculiar circumstances of the case remove the presumption of knowledge on the part of the buyer, a defect, though otherwise visible and obvious, would be held to be included in the general warranty. Thus, it is said in the Year-Books, that, although the defect be apparent, as that a horse warranted perfect wants an eye, this does not discharge the seller, *if the purchaser also be blind* (*s*); so, if the horse be bought without being exhibited to the purchaser (*t*). And the defect must be immediately obvious to common observation, not such as requires particular investigation to discover. Thus, "if cloth be warranted of such a length, when it is not, there an action on the case lies for damages; for that cannot be ascertained by sight, but only by collateral proof, *viz.* the measuring it" (*u*). So, where there is at the time of the sale a patent defect, such that it may be the *possible cause* of a subsequent unsoundness, such unsoundness will be held to have been included in the warranty. Thus,

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(*s*) Vin. Abr. *Actions* (A. c.) 7. See Bro. Abr. *Disceit*, pl. 29, citing 11 E. 4. 6—"*Per Fairfax*; if a man sells cloths of a murrey colour, and warrants that they are blue, it is a void warranty; for it is apparent by the view. But *per Brian*; if the vendee be blind, in such case disceit lies."

(*t*) 2 Stark. Ev. 905, note (*u*), (2nd Ed.).

(*u*) 3 Bl. Com. 465. So, it is laid down in Vin. Abr. *Actions* (Z. b.) 15. "If one sells a horse that is blind and warrants him to be sound, no action lies, because the purchaser may see whether he be blind or not; but otherwise where he has a disease in the eye which cannot easily be discerned."

Breach. where in the sale of a horse it was disclosed to the plaintiff at the time of the contract that the animal had a "splint," and on the trial it appeared in evidence that some splints occasion lameness, and others do not, so that the purchaser cannot be certain at the time whether lameness will be the necessary consequence,—it was held, that a lameness subsequently arising from the splint, was a breach of a general warranty of soundness (*x*).

II. *Extent—Particular Breach— Warranty of a Horse.*

As many questions, necessarily inapplicable to the subject of general warranty, arise in respect of warranties in sales of horses, this particular subject may be separately considered.

Warranty of horse. The plaintiff must prove positively that the horse was unsound at the time of the sale; it is not sufficient to give such evidence as to induce a mere suspicion of unsoundness (*y*). The question of soundness or unsoundness is a question peculiarly fit for the consideration of a jury; and the

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(*x*) *Margetson*, v. *Wright*, 8 Bingh. 454. S. C. 1 M. & Scott, 622. See an old case similar in circumstances, *Dorrington* v. *Edwards*, (2 Roll. Rep. 188; S. C. Vin. Abr. *Actions* [Z. b.] 14.) "If a horse be sold warranted sound, whereas he is shoulder-pitched and has *splints* upon his legs, an action lies; *for these imperfections are not subject to the view without some skill.*"

(*y*) *Eaves* v. *Dixon*, 2 Taunt. 343.

Court refused to interfere, where evidence had been given on both sides, and the judge who tried the cause declared he would have been better satisfied had the verdict been the other way (*z*). Where there has been a special warranty, the vendor will be liable for a partial breach: thus, proof that a horse is a good drawer, will not satisfy a warranty that "he is a good drawer and pulls quietly in harness" (*a*). Warranty of horse.

Upon the question of what constitutes a breach of a general warranty of soundness, a variety of cases have been decided.

It was ruled by Eyre, C. J., that a mere temporary injury or hurt, which is capable of being speedily cured or removed, is not a breach of a general warranty of soundness (*b*). But Lord Ellenborough held, that any infirmity, of such a nature as to render the animal less fit for present use, constituted an unsoundness, and that it was not necessary to be either permanent or incurable (*c*); such as a temporary lameness or cough (*d*), or a "snap" in the eye,—which is explained to Temporary injury. Lameness. Cough.

(*z*) *Lewis* v. *Peake*, 7 Taunt. 153. *Gibbs*, C. J., mentioned a similar case, *ib.* 154. And see 8 B. Moore, 33.

(*a*) *Coltherd* v. *Puncheon*, 2 D. & R. 10.

(*b*) *Garment* v. *Barrs*, 2 Esp. 673.

(*c*) *Elton* v. *Jordan*, 1 Stark. N. P. C. 127; *Elton* v. *Brogden*, 4 Campb. 281.

(*d*) 1 Stark. N. P. C. 127. *Shillitoe* v. *Claridge*, 2 Chit. Rep. 425. See *King* v. *Price*, id. 416.

Warranty of horse. mean an injury arising from a slight blow (*e*). It has been held that, under a general warranty,

Crib biting. "crib-biting" is not an unsoundness; although it was proved to be the result of indigestion in the animal, and sometimes an indication of incipient disease, leading to unsoundness (*f*). And mere

Bad shape. badness of shape, though a possible cause of subsequent lameness, is not an unsoundness (*g*). So,

Roaring. it has been held that "roaring" is not an unsoundness, where it merely results from a bad habit, or from any cause which does not interfere with the general health and muscular powers of the animal (*h*). But it is otherwise where the "roaring" is symptomatic of organic disease (*i*). And in a case where it was proved, that the disorder arose from the neck of the wind-pipe being too narrow for accelerated respiration, (being frequently produced by sore throat or other topical inflammation,) and was then of such a nature as to incommode a horse very much when pressed to his

(*e*) *Morris* v. *Lithgoe*, 2 Smith Rep. 396.

(*f*) *Brœnnenburgh* v. *Haycock*, Holt, N. P. C. 630. But it is said that "crib-biting" has been held to be a *vice* within the meaning of a warranty that the horse "was free from vice;" *Paul* v. *Hardwick*, Hil. T. 1831, MS., cited Chit. Contr. 368, note (*l*), (2nd Ed.).

(*g*) *Dickenson* v. *Follett*, 1 M. & Rob. 299. But if lameness were actually produced, though indirectly, it would be a breach of the warranty. See id. 300; 8 Bingh. 454; infra, p. 359 (*n*).

(*h*) *Bassett* v. *Collis*, 2 Campb. 523, *cor.* Lord *Ellenborough*, C. J. The same was ruled by *Mansfield*, C. J., *ibid.*

(*i*) Ibid.

speed,—Lord Ellenborough held that this constituted an unsoundness(*k*). It has been held that a horse which is "chestfoundered" is unsound(*l*). With respect to "thrushes," "splints," and "quidding," it has been said that a diversity of opinion prevails, and that, from the contradictory evidence given by veterinary surgeons respecting the nature of these infirmities, no general rule on the subject can be laid down(*m*). But from a subsequent decision it may be collected, that a "splint" is not in itself an unsoundness, as the nature of the infirmity appears to be that it may or may not, according to circumstances, be the efficient cause of lameness; yet, that, if proof be given at the trial that lameness has actually been produced by the splint, although there may have been no symptoms of lameness at the time of the contract, the plaintiff will be entitled to recover(*n*). A "nerved" horse is unsound; the operation of "nerving"

Warranty of horse. Chestfoundered. Quidding. Splint. Nerving.

(*k* *Onslow* v. *Eames*, 2 Stark. N. P. C. 81.

(*l*) *Atterbury* v. *Fairmanner*, 8 B. Moore, 32.

(*m*) 2 Campb. 524, n.

(*n*) *Margetson* v. *Wright*, 1 M. & Scott, 622; S. C. 8 Bingh. 454. See *per Tindal*, C. J., 1 M. & Sc. 627; "The jury found, that, although the horse exhibited no symptoms of lameness at the time when the contract was made, he had then upon him the *seeds of unsoundness* arising from the 'splint.' .... If the lameness complained of had proceeded from a new or different splint, or from the old splint taking a new direction in its growth so as to affect a sinew, not having affected one before, such a lameness would not have been within the warranty; for it would not have constituted a present unsoundness at the time of the warranty

Warranty of horse.

being the dividing of a nerve in the leg, usually performed in order to relieve the animal from the pain arising from a disease in the foot(*o*).

III. DAMAGES.

Amount of damages.

The plaintiff is in general entitled to recover in respect of all losses which have resulted immediately from the breach of warranty(*p*). Thus, where a warranty had been given on the sale of a chain-cable, it was held, that the plaintiff might recover the value both of the cable itself, and of an anchor which had been attached thereto, and which had been lost by the breaking of a link in the cable(*q*). So, where the vendee has been induced by the warranty of the defendant to sell the chattel with a warranty to a third party, and the

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made; but the jury find that the very splint in question is the efficient cause of lameness." In a recent case at nisi prius it was held that "bone spavin," though unattended with actual lameness, was an unsoundness,—being a probable cause of future lameness; *Watson* v. *Denton*, 7 C. & P. 85.

So, where several sheep had been sold "warranted sound," and it appeared that, although they were apparently thriving at the time of the sale, the greater part had afterwards died from a disease called the "goggles,"—*Abbott*, C. J., left it to the jury, "whether, at the time of the sale, the sheep had, existing in their blood or constitution, the disease of which they afterwards died; or whether it had arisen from any subsequent cause?"—*Joliff* v. *Bendell*, Ry. & M. 136.

(*o*) *Best* v. *Osborne*, Ry. & Moo. 290.

(*p*) 2 Stark. Ev. p. 905, (2nd Ed.).

(*q*) *Borradaile* v. *Brunton*, 2 B. Moore, 582.

latter sues and recovers for the breach, the vendee is entitled to recover the costs and damages of such action (the defendant having had notice thereof), as a part of the damages which he has sustained by reason of the false warranty (*r*). Damages.

The purchaser is not bound to offer to return the chattel sold (*s*), nor is the vendor bound to receive it if offered (*t*): but if the purchaser has actually returned it, and the vendor has agreed to accept it, the measure of damages, in an action for the breach of warranty, necessarily is the amount of the price which has been paid (*u*). If the chattel has not been returned, the measure of damages is, the difference between the actual value of the goods and the value which the plaintiff would have been entitled to expect had the contract been faithfully performed (*x*). And, as Where the chattel has been returned. Where it has not been returned.

(*r*) *Lewis* v. *Peake*, 7 Taunt. 153; S. P. *Pennell* v. *Woodburn*, 7 C. & P. 117. It has been ruled, that, if the purchaser resells with a warranty, and the second vendee brings an action against him for the breach, the original seller is a competent witness for the defendant; *Briggs* v. *Crick*, 5 Esp. 99; *Baldwin* v. *Dixon*, 1 M. & Rob. 59. But in a recent case it was ruled *contra*; *Biss* v. *Mountain*, 1 M. & Rob. 302, *cor. Alderson*, B., 1833.

(*s*) See below, p. 363.

(*t*) Supra, p. 327, et seq. and 328, note (*l*).

(*u*) *Creswell* v. *Coare*, 1 Taunt. 566. *Bridge* v. *Wain*, 1 Stark. N. P. C. 504.

(*x*) *Bridge* v. *Wain*, 1 Stark. N. P. C. 504. See 3 Esp. 84. Or, the difference between the actual value and the *price given*; see 1 Taunt. 568. There seems to be a possible distinction be-

Damages. Where it has been resold.

the purchaser is at liberty, if he choose, to resell the chattel(*y*), he may recover the difference between the price given by him and the price received on such resale(*z*), and also the expenses of keep (if any, as in the sale of a horse), for a reasonable time, for the purpose of reselling to the best advantage(*a*). Whether the time of keeping is reasonable or not, is a question for the jury(*b*); it seems, however, that in every case the purchaser will be entitled to *some* allowance for the keep(*c*).

Waiver.

Delay in making the objection will not prejudice the plaintiff's right to recover damages for the breach of warranty(*d*); nor will the vendor be permitted to give evidence of a custom of trade, that the purchaser is precluded from objecting to

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tween the two: for it may be, that, had the vendor duly performed his stipulated agreement, the value of the chattel to the vendee would have been greater than the price he undertook to give.

(*y*) See next page, note (*l*).

(*z*) *M'Kenzie* v. *Hancock*, Ry. & Moo. 436. See 1 Taunt. 568.

(*a*) *Ellis* v. *Chinnock*, 7 C. & P. 169. Ry. & M. 436; 4 Nev. & Man. 195. *King* v. *Price*, 2 Chit. Rep. 416; Selw. N. P. 657, (8th Ed.).

(*b*) *Chesterman* v. *Lamb*, 2 Ad. & Ell. 129; S. C. 4 Nev. & Man. 195.

(*c*) See *per Denman*, C. J., 2 Ad. & Ell. 132. But *Mansfield*, C. J. said, that the plaintiff could not recover for the keep, unless he had previously tendered the horse; 1 Taunt. 567; 2 Campb. 82.

(*d*) *Freeman* v. *Baker*, 5 C. & P. 475, 483; 2 Nev. & Man. 446.

the goods unless he has notified his disaffirmance immediately(*e*); or a custom that he is bound to accept an allowance for the inferior quality(*f*). Nor is the purchaser bound to offer to return the chattel(*g*). For, although, after acceptance and acquiescence on the part of the purchaser, a breach of the warranty does not work such a rescission of the contract as to enable him to sue for money had and received(*h*), or to set up the breach in bar of an action for the price (*i*), yet, keeping the chattel is not such a waiver of the breach as to discharge the vendor's liability on his express undertaking: because "no length of time elapsed after the sale can alter the nature of a contract originally false"(*k*). So, the vendee is not precluded from recovering, by a resale of the chattel(*l*), nor by keeping it after discovering the defect, and using means to cure such defect, so as to put the

Damages.

(*e*) *Yeats* v. *Pim*, 2 Marsh. 141.

(*f*) *Hibbert* v. *Shee*, 1 Campb. 113.

(*g*) *Fielder* v. *Starkin*, 1 H. Bl. 17; *Buchanan* v. *Parnshaw*, 2 T. R. 745. See 3 Esp. 84; *Anon.*, cited by *Willes*, J., 1 H. Bl. 20.

(*h*) Supra, p. 328, note (*l*).

(*i*) Supra, p. 268.

(*k*) *Per* Lord *Loughborough*, C. J., 1 H. Bl. 19. And if the vendor has filed a bill for the price, and the purchaser has paid the money without disputing the claim, this is not such an acquiescence as to bar his action; *Jeudwine* v. *Slade*, 2 Esp. 573.

(*l*) Selw. N. P. 657, (8th Ed.); 2 Ad. & Ell. 132. See 9 B. & C. 265; 4 Man. & Ry. 208.

Damages.

chattel in a different plight from that in which it was at the time of the sale(*m*).

But, if the express agreement was, that the vendor should take back the chattel if on trial it should be found not to correspond with the warranty, the purchaser cannot recover damages for the breach of warranty if he has kept it for a longer period than is necessary for trial(*n*). And, even in the absence of such an agreement, the not giving notice will afford a strong presumption against the buyer (not, that he has waived the breach, but) that the chattel at the time of the sale had not the defect complained of, and will make the proof on his part more difficult(*o*): thus, where the vendor warranted certain saffron to be of merchantable quality, and the vendee kept it for six months and sold part, it was held, in an action for the breach, to be properly left to the jury to infer that the article was such as the plaintiff intended to purchase(*p*).

(*m*) *Patteshall* v. *Tranter*, 4 Nev. & Man. 649.

(*n*) *Adams* v. *Richards*, 2 H. Bl. 573. The stipulation, that a *trial* shall be allowed, will be intended to mean a reasonable trial; *id.* 574.

(*o*) *Per* Lord *Loughborough*, C. J., 1 H. Bl. 19. See 1 Ad. & Ell. 42. In 2 Marsh. 143, *Gibbs*, C. J., said, "that the plaintiff did not make his complaint at first, might lead to a conclusion that the damage did not exist at the time of the sale."

(*p*) *Prosser* v. *Hooper*, 1 B. Moore, 106. Especially where a low price had been given, *id.*

PART III.

RIGHTS AND LIABILITIES OF VENDOR IN RESPECT OF THIRD PARTIES.

I. PARTNERS OF VENDEE.
II. SURETIES.
III. AGENTS.

CHAP. I.

RIGHTS AND LIABILITIES OF VENDOR IN RESPECT OF PARTNERS OF VENDEE.

Purchase by one partner binds co-partner.

A purchase by one partner binds the firm (*a*); even if the purpose to which the goods are intended to be applied, be fraudulent against the co-partners, provided that the seller be not a party to the fraud (*b*). The general rule is, that a partner may bind his co-partners in all transactions relating to

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(*a*) *Hyat* v. *Hare*, Comb. 383; Coll. Partn. 215. So, in the drawing, accepting, or indorsing of bills; *Swann* v. *Steele*, 7 East, 210; *Baker* v. *Charlton*, Peake, 80; *Wintle* v. *Crowther*, 1 Cr. & Jer. 316; *Carolina Bank* v. *Case*, 8 B. & C. 427; unless there be covin and collusion on the part of the plaintiff, *Sherriff* v. *Wilks*, 1 East, 48.

(*b*) *Bond* v. *Gibson*, 1 Campb. 185; *Rapp* v. *Latham*, 2 B. & A. 795.

Extent of liability.

the partnership(*c*); or in the words of Lord Kenyon, "one partner may pledge the credit of the firm to any extent." And no private understanding, or express arrangement, among the partners themselves, with the view of limiting their liability, can avail them in respect of third parties without notice(*d*).

I. HOW PARTNERSHIP LIABILITY MAY BE CREATED.

Persons may become liable as partners, as well where the legal relation of partnership actually subsists *inter se*, as where the relation is implied from the fact that they have held themselves out to the world as partners(*e*). And the liability may be founded either on the ground of a general trading partnership, or the course of dealing in a particular transaction. Therefore partnership liability may be considered under two heads, viz. partnership *in name* and partnership *in interest*. Under the former are included,—the general case of nominal partners of a firm, whether really interested or not, and the particular case of parties

(*c*) See 1 East, 48; 2 B. & A. 679. *Anon.* v. *Layfield*, 1 Salk. 292.

(*d*) *Waugh* v. *Carver*, 2 H. Bl. 235; *Sandilands* v. *Marsh*, 2 B. & A. 679, *per* Lord *Tenterden*, C. J.; *Rex* v. *Dodd*, 9 East, 527, *per* Lord *Ellenborough*, C. J.; *Gleadon* v. *Tinkler*, Holt, N. P. C. 586; *Biggs* v. *Fellows*, Dan. & Lloyd, Merc. Ca. 121.

(*e*) See *Dickenson* v. *Valpy*, 10 B. & C. 140; S. C. 5 M. & Ry. 126; *Hoare* v. *Dawes*, 1 Dougl. 371; *Braithwaite* v. *Skofield*, 9 B. & C. 401; Coll. Partn. p. 3.

holding themselves out as partners in any individual transaction. Under the latter are included,—the general case of dormant or secret partners in a firm (who are decided to be liable when discovered), and the particular case of parties becoming liable as partners in an individual transaction, on the ground of a participation in the profits and losses of the adventure(*f*). Creation of liabilty.

1. *Partners in Name.*

A nominal partner, or one who allows his name to be used, is liable, although he may not participate in the profits(*g*). Thus a clerk whose name has been used in the firm with his own consent, is liable, though he receive a fixed salary, and have no share in the profits(*h*). "Where a person allows his name to appear in a firm, exposed to the public over a shop-door, or to be used in printed invoices or bills of parcels, or to be published in advertisements, the knowledge of the party that Nominal partner in a firm.

(*f*) A partner in name is held liable on the ground, that, by holding out as partners persons not in fact interested, a false appearance of credit and responsibility might be assumed :—while the liability of partners in interest is founded on this, that they lessen that fund on which the creditor relies for payment.

(*g*) Ex parte *Watson*, 19 Ves. Jun. 459. Yet, upon a plea of abatement for nonjoinder, evidence may be given to show that the nominal partner was not really interested. See the distinction, *Kell* v. *Nainby*, 10 B. & C. 21 ; *Davenport* v. *Rackstrow*, 1 C. & P. 89.

(*h*) *Guidon* v. *Robertson*, 2 Campb. 302.

Partners in name.

his name is used, and his assent thereto, is the very ground upon which he is estopped from disputing his liability as a partner"(*i*). It is not necessary that the vendor at the time of the sale should be aware of the partnership, to enable him to sue the nominal partner(*k*). But if he had notice of the stipulation that the nominal partner should not be liable for losses, he is concluded from recovering against him(*l*).

Holding out name as a partner in particular transactions.

On the same principle, where the defendant has allowed his name to be held out to the plaintiff, as a partner in a particular transaction, he will be equally liable in respect of such transaction, as if he had universally represented himself to be a partner. Lord Kenyon, C. J. thus lays down the law;—" Although in point of fact parties may not be partners in trade, yet if one so represents himself, and by that means gets credit for goods for the other, both shall be liable"(*m*). And Parke, J. says, " If it can be proved that the defendant has held himself out to be a partner, not to the world, for that is a loose expression, but to the plaintiff himself, or under such circumstances of publicity as to satisfy a jury that the plaintiff knew of it

(*i*) *Fox* v. *Clifton*, 6 Bingh. 794, *per Tindal*, C. J. See *per Bayley*, J., *Vere* v. *Ashby*, 10 B. & C. 296.

(*k*) *Young* v. *Axtell*, 2 H. Bl. 242.

(*l*) *Alderson* v. *Pope*, 1 Campb. 404, n.

(*m*) *De Berkom* v. *Smith*, 1 Esp. 30.

and believed him to be a partner, he would be liable in all transactions in which he engaged and gave credit to the defendant upon the faith of his being such partner"(*n*). Partners in name.

2. *Partners in Interest.*

Participation in profits creates a partnership liability. A dormant or secret partner is decided to be liable jointly with the ostensible partner as soon as the partnership is discovered(*o*). The liability however of a dormant partner ceases, without further public notice, by his act of quitting the firm, at least in respect of those subsequently dealing with the firm, and who never were aware that he was a partner(*p*). Dormant partner in firm.

The same rule holds in particular transactions as in general trading partnerships, whether the Participation in profits in particular transactions.

(*n*) *Dickenson* v. *Valpy*, 10 B. & C. 140, 141.

(*o*) *Robinson* v. *Wilkinson*, 3 Price, 538; *Hubert* v. *Nelson*, Davies B. L. p. 8; *Chuck* ex parte, 8 Bingh. 469; S. C. 1 M. & Sc. 615; *Ruppell* v. *Roberts*, 4 Nev. & Man. 31. Yet a plea in abatement for nonjoinder of such partner as defendant could not be supported, *Mullett* v. *Hook*, M. & Malk. 88, *Stansfield* v. *Levey*, 3 Stark. N. P. C. 8. (*Dubois* v. *Ludert*, 5 Taunt. 609, being overruled, *De Mantort* v. *Saunders*, 1 B. & Ad. 398.) Nor is he obliged to join as co-plaintiff, *Lloyd* v. *Archbowle*, 2 Taunt. 324, *Mawman* v. *Gillett*, 2 Taunt. 325, n.; but he may join or not at his option, *Cothay* v. *Fennell*, 10 B. & C. 671, S. C. Lloyd & Welsby, Merc. Ca. 297.

(*p*) *Carter* v. *Whalley*, 1 B. & Ad. 11; *Heath* v. *Sansom*, 4 B. & Ad. 172; S. C. 1 Nev. & M. 104; *Evans* v. *Drummond*, 4 Esp. 89.

Partners in interest.

party receives the profits to his own use(*q*), or as trustee for another(*r*). And although the agreement among the parties themselves may be that such person shall not be liable to risk or loss, this is immaterial, because a participation in the profits will by presumption of law make him liable for the losses(*s*). Thus, an agreement between two merchants to divide equally the commissions on the sale of all goods recommended by one to the other, makes them liable as partners(*t*). Nor is it material whether the *purchase* was joint or separate, provided the *adventure* was joint(*u*). Therefore it may happen that each party may not (as between themselves) possess any interest in the goods purchased on the account of the other, and yet both be liable for the price to the seller(*x*). Thus, an agreement between J. S. and another,

(*q*) *Browne* v. *Gibbins*, 5 Brown P. C. 491; *Goode* v. *Harrison*, 5 B. & A. 147; *Tench* v. *Roberts*, 6 Madd. 145, n. See *London Gas Company* v. *Nicholls*, 2 C. & P. 365.

(*r*) *Wightman* v. *Townroe*, 1 M. & S. 412.

(*s*) Ex parte *Langdale*, 18 Ves. Jun. 300; *Waugh* v. *Carver*, 2 H. Bl. 235, 247.

(*t*) *Cheap* v. *Cramond*, 4 B. & A. 663. See *Green* v. *Beesley*, 2 Bingh. N. S. 108.

(*u*) *Gouthwaite* v. *Duckworth*, 12 East, 421. The difference between this case and that of *Saville* v. *Robertson*, 4 T. R. 720, was, that in the latter neither the purchase nor the adventure were to be joint, until the cargo should be delivered on board, and all the separate parcels of goods mixed. See 12 East, 426; 4 T. R. 725. And see *Young* v. *Hunter*, 4 Taunt. 582.

(*x*) *Hesketh* v. *Blanchard*, 4 East, 144; *Gouthwaite* v. *Duckworth*, 12 East, 421.

that J. S. shall purchase goods, and receive, instead of brokerage, a share in the profits, and bear a certain proportion of the losses, makes J. S. a partner in respect of third parties (*y*). Partners in interest.

But although a private understanding among parties participating in the profits of an adventure, that each shall be liable for his own losses only, cannot affect the vendor, yet, if the vendor himself has notice of such understanding, and assents to it expressly or tacitly, he cannot afterwards fix upon each purchaser a liability for the whole. Thus, where, from the correspondence between the plaintiff and defendants, and from all the circumstances of the case, the reasonable inference to be drawn was, that the vendor had considered the transaction as divisible, and had charged each party for a separate moiety, although all had joined in giving the order, it was held that each was to be deemed liable for his own share only; and the plaintiff having sued them jointly on the contract, was nonsuited (*z*). Exception, where vendor charged the parties separately.

Where, in point of fact, there was no participation of profits, the parties will not be liable as

(*y*) *Smith* v. *Watson*, 2 B. & C. 401. The question in this case was between the parties themselves, whether J. S. had any interest in the subject-matter of the adventure; and although this was decided in the negative, the Court agreed that he would have been liable to third persons as a partner.

(*z*) *Gibson* v. *Lupton*, 9 Bingh. 297; S. C. 2 M. & Sc. 371. See *Batty* v. *M'Cundie*, 3 C. & P. 202.

Partners in interest.

partners. Thus, a mere agreement among several persons to purchase goods in the name of one, when there does not appear to be any joint interest in the re-sale, will not make any but the ostensible buyer liable(*a*).

Distinction between share in profits, and salary charged on profits.

A rather refined distinction is taken between the case where the party actually shares in the profits, and the case where he receives by way of salary a sum proportioned to the profits, and for the payment of which he in some degree relies on the general fund(*b*); in the latter instance he is decided not to be liable as partner. Thus, a remuneration made to a clerk or agent by a portion of the sums received by or for his principal, in lieu of a fixed salary, is considered to be nothing more than a mode of payment adopted to increase or secure exertion, and does not create a partnership liability(*c*). On this principle, a broker who by agreement was entitled to retain all the money he could procure for the goods beyond a certain sum, instead of receiving a fixed per centage, was decided not to be a partner(*d*). An agreement that

(*a*) *Coope* v. *Eyre*, 1 H. Bl. 37; *Saville* v. *Robertson*, 4 T. R. 720.

(*b*) *Watson* ex parte, 19 Ves. Jun. 461; *Hamper* ex parte, 17 Ves. Jun. 404; *Grace* v. *Smith*, 2 Bl. Rep. 1000, *per De Grey*, C. J. and *Blackstone*, J.

(*c*) *Meyer* v. *Sharpe*, 5 Taunt. 74. See *per Abbott*, C. J., 4 B. & A. 670.

(*d*) *Benjamin* v. *Porteus*, 2 H. Bl. 590, (*Eyre*, C. J., *dubitante*).

the defendant, in consideration of working a lighter, should receive half of her gross earnings, while the owner was to receive the other half, does not make defendant liable, as a partner, for repairs (*e*); for this is only a mode of paying him wages for his labour, and is distinguished from a participation of profits and loss (*f*). So, an agreement by a sailor to receive, by way of wages, a certain proportion of the produce of the voyage, does not constitute him a partner (*g*). Partners in interest.

II. *How the Liability may be determined.*

Where parties have contracted the legal relation of partnership, they must give notice of the dissolution in order to get rid of the partnership liability (*h*). It is said that the publication of the dissolution in the Gazette would be a sufficient notice to all strangers, without proof that they have seen it (*i*); at all events to persons who have not previously had dealings with the firm (*k*). If, Notice of dissolution.

(*e*) *Dry* v. *Boswell*, 1 Campb. 329.

(*f*) *Per* Lord *Ellenborough*, C. J., id. 330; see *per* Lord *Ellenborough*, *Mair* v. *Glennie*, 4 M. & S. 244.

(*g*) *Wilkinson* v. *Frazier*, 4 Esp. 182. And see *Wish* v. *Small*, 1 Campb. 331, n.; *Rex* v. *Hartley*, Russ. & Ry. Cr. Ca. R. 139; *Rex* v. *Hoggins*, id. 145. See *per Best*, C. J., *Whittington* v. *Herring*, 3 M. & P. 48.

(*h*) *Gorham* v. *Thompson*, Peake, 42; *Jenkins* v. *Blizard*, 1 Stark. N. P. C. 418; *Parkin* v. *Carruthers*, 3 Esp. 248.

(*i*) *Wright* v. *Pulham*, 2 Chit. Rep. 121. But see *Graham* v. *Hope*, Peake, 154; *Godfrey* v. *Macauley*, id. 209, n. (3rd Ed.)

(*k*) *Godfrey* v. *Turnbull*, 1 Esp. 371. If notice can be proved

Cessation of liability.

after notice of dissolution published in the Gazette, the name of the retired partner be used with his consent, he may become liable upon subsequent contracts (*l*); for the partnership will be considered in law as still continuing, on the same ground that nominal partners in general are deemed liable. But a retired partner will not be liable, if his name has been used without his consent (*m*); nor, if it be used merely for some specific and temporary purpose (*n*). Again, if the retired partner continue to participate in the profits, the partnership will not, in reference to third parties, be deemed to be at an end (*o*).

Notice of disclaiming partnership.

Although a general trading partnership may not have actually existed, yet if a party has once held himself out as a partner, and incurred the responsibilities, he will continue liable until he has done some overt act to rid himself of the liability (*p*). But, where the seller has notice that the party has

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to have been received through advertisement or otherwise, it does not seem necessary to prove publication of the dissolution in the Gazette; *Booth* v. *Quin*, 7 Price, 193. A dormant partner need not give notice of his retirement to save his liability in respect of persons who never knew that he was a partner; *Carter* v. *Whalley*, 1 B. & Ad. 11. Supra, p. 369.

(*l*) *Williams* v. *Keats*, 2 Stark. N. P. C. 290; *Brown* v. *Leonard*, 2 Chit. Rep. 120.

(*m*) *Newsome* v. *Coles*, 2 Campb. 617.

(*n*) *M'Iver* v. *Humble*, 16 East, 169.

(*o*) *Wilson* ex parte, Buck, 48.

(*p*) *Doubleday* v. *Muskett*, 4 M. & P. 750; S. C. 7 Bingh. 110; *Goode* v. *Harrison*, 5 B. & A. 147.

disclaimed the partnership, he cannot afterwards charge him (*q*). Cessation of liability.

The dissolution of partnership will not in general affect prior transactions (*r*); yet an express or implied assent on the part of the parties interested may bar their right against the retired partner. Thus, where the partnership is dissolved after the order for the goods is given, but before the arrival of the consignment, and the remaining partner afterwards receives the goods, for the price of which the vendor takes his sole acceptance, the vendor cannot afterwards support any claim against the retired partner (*s*). So, if the vendor agree to accept, in lieu of the partnership debt, a bill of exchange accepted only by the partner still carrying on the business, or other similar security, so as to imply that he accepts the remaining partner as his sole debtor,—such agreement will afford a defence, by way of accord and satisfaction, to an action brought by the vendor against the retired partner (*t*). It has been decided, indeed, Effect of dissolution.

(*q*) *Minnit* v. *Whitney*, 5 Vin. Abr. 244; *Willis* v. *Dyson*, 1 Stark. N. P. C. 164. Coll. Partn. 214.

(*r*) *Per Heath*, J., *Wood* v. *Braddick*, 1 Taunt. 105; see *Ault* v. *Goodrich*, 4 Russ. 430.

(*s*) *Harris* ex parte, 1 Madd. 583. See *Wells* v. *Ross*, 7 Taunt. 403; *Pinder* v. *Wilks*, 5 Taunt. 612; S. C. 1 Marsh. 248.

(*t*) *Thompson* v. *Percival*, 5 B. & Ad. 925; S. C. 3 Nev. & Man. 167; *Evans* v. *Drummond*, 4 Esp. 92. See *Reed* v. *White*, 5 Esp. 122; 2 Stark. N. P. C. 178; 2 B. & A. 216.

Cessation of liability.

that unless some fresh security has been given, so as to make the substituted debt preferable in some respect to the original debt, the promise by the creditor to exonerate the retiring partner is without consideration (*u*). But some doubt has recently been thrown upon the cases which uphold this doctrine, by the language and decision of the Court of King's Bench (*x*): "Many cases may be conceived in which the sole liability of one of two debtors may be more beneficial than the joint liability of two, either in respect of the solvency of the parties, or the convenience of the remedy; and whether it was actually more beneficial in each particular case cannot be made the subject of inquiry" (*y*). Yet mere knowledge of the dissolution of partnership and dealing with the new firm, are not sufficient to discharge the liability of the retired partner: some act is necessary on the part of the creditor to show distinctly that he agrees to substitute the liability of the continuing partners for that of the old firm (*z*).

(*u*) *Lodge* v. *Dicas*, 3 B. & A. 611; *David* v. *Ellice*, 5 B. & C. 196, S. C. 1 C. & P. 368; *Heath* v. *Percival*, 1 P. Wms. 682.

(*x*) Of the case of *David* v. *Ellice*, the Court observed,—"that decision, on consideration, is not altogether satisfactory to us;" 5 B. & Ad. 933.

(*y*) *Per* Lord *Denman*, C. J., delivering the judgment of the Court in *Thompson* v. *Percival*, 5 B. & Adol. 933. See S. C. 3 Nev. & M. 167.

(*z*) *Kirwan* v. *Kirwan*, 4 Tyrwh. 491; S. C. 2 Cr. & Mees. 617.

CHAP. II.

RIGHTS AND LIABILITIES OF VENDOR IN RESPECT OF SURETIES.

SECTION I.—*Of the sufficiency of the Agreement, under the Fourth Section of the Statute of Frauds.*

Guaranty must be in writing.

By the Statute of Frauds it is enacted (*a*), "that "no action shall be brought whereby to charge the "defendant upon any special promise to answer "for the debt, default or miscarriage, of another "person; unless the agreement upon which such "action shall be brought, or some memorandum "or note thereof, shall be in writing and signed by "the party to be charged therewith, or some other "person thereunto by him lawfully authorized."

The first consideration is, what agreements are within the statute;—and the second, what is a sufficient note or memorandum to satisfy the statute.

I. *What Agreements are within the Statute.*

What agreement within the statute.

In general, any promise or agreement which in substance amounts to an undertaking to guarantee

(*a*) 29 Car. II. c. 3, s. 4.

Agreement within Statute of Frauds.

the particular debt, or the general solvency, of some third party, is within the meaning of the statute, and void unless in writing(*b*); whether such promise or agreement stands alone, or is coupled with some other undertaking(*c*).

Thus, where the vendor has been induced to deliver goods upon credit to the purchaser, on the promise of the defendant made in such words as, "If you do not know him you know me, and I will see you paid"(*d*); or, "I will pay you if he does

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(*b*) *Fish* v. *Hutchinson*, 2 Kenyon, 537, S. C. 2 Wils. 94; *Rains* v. *Storry*, 3 C. & P. 130; *Barber* v. *Fox*, 1 Stark. N. P. C. 270; *Kirkham* v. *Marter*, 2 B. & A. 613; *Buckmyr* v. *Darnall*, 2 Ld. Raym. 1085. Under the new Rules of Pleading (Hil. T. 4 Will. IV.) the absence of a sufficient written memorandum, in an action on a guaranty, must be specially pleaded; (see *Barnett* v. *Glossop*, 1 Bingh. N. S. 633, which was an action on the assignment of a copyright;) even formerly such defence might have been pleaded specially, though admissible under the general issue; *Magge* v. *Ames*, 1 M. & Payne, 294; S. C. 4 Bingh. 470. It has been said that the replication to such plea should not take issue merely, but ought to set out the written agreement; *Lowe* v. *Eldred*, 1 Cr. & Mees. 239: See 4 B. & A. 596. But the opinion does not seem well founded; and in a very recent case a contrary opinion was intimated; *Wakeman* v. *Sutton*, 2 Ad. & Ell. 78. See *Lysaght* v. *Walker*, 5 Bligh, N. S. 1, 25; *Lilley* v. *Hewitt*, 11 Price, 494.

(*c*) *Chater* v. *Beckett*, 7 T. R. 201. A written agreement to guarantee payment for goods, is exempted from the usual agreement stamp, as "relating to the sale of goods, wares, and merchandise;" *Warrington* v. *Furbor*, 8 East, 242; *Watkins* v. *Vince*, 2 Stark. N. P. C. 368; *Curry* v. *Edensor*, 3 T. R. 524: Supra, p. 219.

(*d*) *Matson* v. *Wharam*, 2 T. R. 80.

not"(*e*); or, "I will be bound for the payment as far as £——"(*f*), the promise is a guaranty within the statute. And it is immaterial whether the promise was made before or after the delivery of the goods(*g*).

Agreement within Statute of Frauds.

Where the agreement is a collateral undertaking within the statute, the defendant, necessarily, does not become primarily liable, but only guarantees the payment in the event of the purchaser making default(*h*). But if the defendant has made himself liable in the first instance on his undertaking, such undertaking is not within the statute. Thus, where the original credit was given to the defendant himself(*i*), or, where by the express words of his undertaking the defendant has bound himself in the first instance, and not conditionally on the default of another(*k*), he will be primarily liable. So, where the original purchaser, being unable to pay for the goods, transferred them to the defend-

When the defendant is liable primarily.

Distinction between original and collateral undertaking.

(*e*) *Peckham* v. *Faria*, 3 Dougl. 13.

(*f*) *Anderson* v. *Hayman*, 1 H. Bl. 121.

(*g*) *Jones* v. *Cooper*, Cowp. 227; S. C. Lofft, 769. See 2 T. R. 80; *Parsons* v. *Walter*, 3 Dougl. 13, n.

(*h*) *Rains* v. *Storry*, 3 C. & P. 130; *Mines* v. *Sculthorpe*, 2 Campb. 215.

(*i*) *Darnell* v. *Fealt*, 2 C. & P. 82; *Simpson* v. *Penton*, 2 Cr. & Mees. 430; *Croft* v. *Smallwood*, 1 Esp. 121; *Keate* v. *Temple*, 1 B. & P. 158. Supra, p. 246, 7.

(*k*) *Dixon* v. *Hatfield*, 10 B. Moore, 42; S. C. 2 Bingh. 439; *Redhead* v. *Cator*, 1 Stark. N. P. C. 14; *Taylor* v. *Hilary*, 5 Tyrwh. 373.

Agreement within Statute of Frauds.

ant, a promise by the latter to pay the price was held to be an original undertaking, and not a promise within the statute to pay the debt of another(*l*).

Again, where the undertaking to pay the debt is conditional, not on the default of the party from whom the debt is due, but, on some other event, such as to furnish a good consideration moving from the plaintiff to the defendant, this is not a guaranty within the statute, but an original undertaking(*m*). Thus, where the promise to pay was, in consideration that plaintiff would abandon his lien on the goods in his hands(*n*); or, that he would forego the exercise of some right which he possesses, such as a right to sell under a bill of sale(*o*), or a right to distrain(*p*);—the undertaking is not within the statute. On this principle, an undertaking by the defendant to pay a debt due to the plaintiff from a third party to whom the defendant is himself indebted, in consideration that such debt due from the defendant shall be deemed

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(*l*) *Browning* v. *Stallard*, 5 Taunt. 450; *Oldfield* v. *Lowe*, 9 B. & C. 73.

(*m*) See *Anstey* v. *Marden*, 1 N. R. 124; *Read* v. *Nash*, 1 Wils. 305; *Bampton* v. *Paulin*, 4 Bingh. 264.

(*n*) *Houlditch* v. *Milne*, 3 Esp. 86; *Castling* v. *Aubert*, 2 East, 325. See *Walker* v. *Taylor*, 6 C. & P. 752.

(*o*) *Barrell* v. *Trussell*, 4 Taunt. 117.

(*p*) *Williams* v. *Leper*, 3 Burr. 1806; S. C. 2 Wils. 302.

to be thereby satisfied, is an original and not a collateral undertaking(*q*). Agreement within Statute of Frauds.

II. *What is a sufficient memorandum or note of the Agreement, within the Statute.*

According to the words of the statute, "the "agreement, or some memorandum or note there- "of" must be "in writing, and signed by the party "to be charged therewith, or some other person "thereunto by him lawfully authorized"(*r*). The words here used are similar in substance to the provisions of the 17th section, which requires a note or memorandum in writing, to support a contract for the sale of goods in certain cases. Therefore, in reference to the sufficiency of the writing evidencing the agreement, the law is similar in both sections; and the cases which have been above cited on the 17th section may be referred to in relation to the present subject(*s*). Sufficiency of the written note.

(*q*) *Lacy* v. *M'Neile*, 4 D. & R. 7; *Hodgson* v. *Anderson*, 3 B. & C. 842. For this is not an agreement to pay the debt of another person, or to pay a sum of money which defendant was not liable for in law, but an agreement to pay his own debt in a particular manner. See 3 B. & C. 856.

(*r*) Supra, p. 377. The signature by a clerk of the plaintiff in the presence of the defendant will not bind the latter; *Dixon* v. *Broomfield*, 2 Chit. Rep. 205. See above, p. 78.

(*s*) Vid. supra, Book I. Chap. iii. Part 1. (p. 50.) The words of the 17th section are, "except some note or memo- "randum in writing of the said bargain be made and signed by "the parties to be charged by such contract, or their agents "thereunto lawfully authorized." Of the form and contents of the note, see pp. 67—72. Of the signature by the parties, pp. 72—74. Of the signature by procuration, pp. 74—78.

Consideration must appear on the face.

An important distinction, however, is taken on one point, on the ground that the words of the fourth section are, that the "*agreement or some "memorandum or note* thereof" must be in writing, and that the word "agreement" must be taken in its legal sense, and deemed to include not only the *promise* by the defendant, but also the *consideration* which is the foundation of such promise. This was first laid down in the celebrated case of *Wain* v. *Warlters*(*t*), and since that decision (although the doctrine has been questioned by high authority(*u*),) it has been repeatedly recognised, and is now established beyond all doubt(*v*). It is accordingly held, that, unless the consideration for the promise, as well as the promise itself, be expressed on the face of the written memorandum, since parol evidence is inadmissible to supply proof of the consideration, the undertaking is to be deemed *nudum pactum*, and no action can be sustained thereon.

Case of *Wain* v. *Warlters*.

(*t*) 5 East, 10. The distinction is clearly founded on the technical import of the word "agreement;" for it was afterwards determined on the 17th section, that, as the word there used is, not agreement, but "bargain," the memorandum need not expressly state the consideration. *Egerton* v. *Matthews*, 6 East, 307. Supra, p. 72.

(*u*) *Per* Lord *Eldon*, Ch., *Minet* ex parte, 14 Ves. Jun. 189; *Gardom* ex parte, 15 Ves. Jun. 286.

(*v*) *Saunders* v. *Wakefield*, 4 B. & A. 595; *Barrell* v. *Trussell*, 4 Taunt. 121; *Atkinson* v. *Carter*, 2 Chit. Rep. 403; *Morley* v. *Boothby*, 3 Bingh. 107; *Cole* v. *Dyer*, 1 Cr. & Jer. 461; *Clancy* v. *Piggott*, 4 Nev. & Man. 496; *Bushell* v. *Beavan*, 1 Bingh. N. S. 103; *Hawes* v. *Armstrong*, id. 761; *Ellis* v. *Levi*, id. 767, n.

Thus, a guaranty in the words, "To the amount of £100 consider me as a security on J. S.'s account," is void as not expressing a sufficient consideration for the promise(*x*). So it is, where the undertaking is expressed to be merely for goods *already supplied* to a third party(*y*). But where the guaranty is for the payment of the price of goods which may be *subsequently* supplied to the third party, there is a sufficient consideration disclosed, to wit, the furnishing of the goods(*z*). So, where the consideration disclosed is, that plaintiff will consent to accept a security which he would not otherwise have taken(*a*), or that he will withdraw a security on which the third party is liable to him(*b*), or that he will employ or repose trust in a third party(*c*),—the consideration expressed is suf-

Consideration.

What sufficient consideration.

(*x*) *Jenkins* v. *Reynolds*, 3 B. & B. 14; S. C. 6 B. Moore, 86.

(*y*) *Wood* v. *Benson*, 2 Cr. & Jer. 95; S. C. 2 Tyrwh. 93; *James* v. *Williams*, 5 B. & Ad. 1109; S. C. 3 Nev. & Man. 196; 2 Dowl. P. C. 481; *Lyon* v. *Lamb*, Fell's Merc. Guar. 228.

(*z*) *Stadt* v. *Lill*, 9 East, 348; S. C. 1 Campb. 242; *Russell* v. *Mozely*, 3 B. & B. 211; *Wood* v. *Benson*, 2 Cr. & J. 95.

(*a*) *Pace* v. *Marsh*, 1 Bingh. 216; S. C. 8 B. Moore, 59; *Morris* v. *Stacey*, Holt, N. P. C. 153; *Boehm* v. *Campbell*, 3 B. Moore, 15.

(*b*) *Shortrede* v. *Cheek*, 1 Ad. & Ell. 57.

(*c*) *Newbury* v. *Armstrong*, 6 Bingh. 201; *Ryde* v. *Curtis*, 8 D. & R. 62; *Lysaght* v. *Walker*, 5 Bligh, N. S. 1. See *per Best*, C. J., *Morley* v. *Boothby*, 3 Bingh. 113; "It has never been said that there must be a consideration directly between the persons giving and receiving the guaranty. It is enough if the person, for whom the guarantee becomes surety, receives a benefit, or the person, to whom the guaranty is given, suffers inconveni-

Consideration.

ficient, and the guaranty binds the defendant. Although the consideration may not appear on the face of the guaranty itself, it is sufficient if it can be collected from letters written by the plaintiff, and which can be distinctly connected with the guaranty (*d*).

SECTION II.—*Of the Construction of the Guaranty.*

The construction of a guaranty may be considered in respect of: I. Compliance with the terms of the guaranty: II. When the guaranty is to be deemed continuing: III. What will be taken to discharge the liability of the surety.

General rule of construction.

I. The general rule in the construction of a guaranty is, that *the words* are to be construed as strongly against the party entering into the undertaking, as the sense will admit of (*e*). The *claim*, however, against the surety is *strictissimi juris*, and

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ence, as an inducement to the surety to become guarantee for the principal debtor."

(*d*) *Coe* v. *Duffield*, 7 B. Moore, 252; *Redhead* v. *Cator*, 1 Stark. N. P. C. 14. See *Huddlestone* v. *Briscoe*, 11 Ves. Jun. 583. And see *Stead* v. *Liddard*, 1 Bingh. 196; *Dobell* v. *Hutchinson*, 5 Nev. & Man. 251. Supra.

(*e*) Per Curiam, *Mason* v. *Pritchard*, 12 East, 228. But in *Burdwell* v. *Lydall*, 7 Bingh. 489, the guaranty was construed favourably for the surety in computing the amount to which he was liable.

it is incumbent on the plaintiff to show that the terms have been strictly complied with (*f*). Terms must be strictly complied with.

Thus, where the guaranty was with a condition that eighteen months credit should be given, the plaintiff, having given twelve only, would not be at liberty, after the expiration of six months more, to call upon the defendant on his guaranty (*g*). So, where the defendant guaranteed the payment of a bill of exchange of a specified amount, and a bill for a larger sum was given, he was held not to be liable even to the extent stipulated (*h*). Where the guaranty purported to be in the event of the bankruptcy of the third party, it was held, that the plaintiff was bound to show that a commission had been actually sued out, and that it was not sufficient merely to prove that the party had committed a secret act of bankruptcy (*i*). Express condition.

Every guaranty is on the implied condition that the plaintiff will assent to it; therefore the plaintiff must prove that he has given the defendant notice Implied condition. Plaintiff must prove notice of assent.

(*f*) *Per* Lord *Ellenborough*, C. J., 1 Stark. N. P. C. 193; *per Buller*, J., 2 T. R. 370; *per Dallas*, C. J., 2 B. Moore, 152. See *Whitcher* v. *Hall*, 8 D. & R. 22; S. C. 5 B. & C. 69. It is sufficient however if the plaintiff has taken reasonable precaution to comply, as far as lay in his power, with the conditions of the guaranty. See *Ogden* v. *Aspinall*, 7 D. & R. 637.

(*g*) *Bacon* v. *Chesney*, 1 Stark. N. P. C. 192; *Holl* v. *Hadley*, 5 Bingh. 54.

(*h*) *Philips* v. *Astling*, 2 Taunt. 206.

(*i*) *Bulkely* v. *Lord*, 2 Stark. N. P. C. 406. The Court afterwards refused a rule to set aside the nonsuit.

Proof of assent.

of his acceptance of the terms offered: otherwise it is a bare proposal by one party, which is not binding, and may be retracted, at any time before acceptance by the other. Thus, a guaranty in these words,—"I understand that A. and Co. have given you an order for rigging, &c.; I have no objection to guarantee you against any loss from giving them this credit,"—was held not to be conclusive without proof of notice of assent given by the plaintiff (*k*).

Retrospective effect.

A guaranty will not (unless actually so expressed) be deemed to have a retrospective effect (*l*). Therefore, a guaranty for the payment of the price of goods furnished to a third party, would not extend to goods previously supplied: if however the delivery was subsequent, though the contract may have been anterior, to the guaranty, the plaintiff may avail himself of the undertaking (*m*).

When the guaranty is continuing or not.

II. It often becomes a material question, whether the guaranty is to be deemed continuing or non-continuing; or, in other words, whether it is applicable to an indefinite period of time, and an indefinite number of transactions, and determinable only by notice,—or whether it is confined to

(*k*) *M'Iver* v. *Richardson*, 1 M. & S. 557; S. P. *Mozley* v. *Tinkler*, 1 Cr. Mees. & R. 692; *Gaunt* v. *Hill*, 1 Stark. N. P. C. 10; *Symmons* v. *Want*, 2 Stark. N. P. C. 370. Supra.

(*l*) See *Glyn* v. *Hertel*, 2 B. Moore, 134, 152.

(*m*) *Simmons* v. *Keating*, 2 Stark. N. P. C. 426.

a single transaction between the parties, and is extinguished as soon as that takes place. The cases on this subject can scarcely be reconciled without entering into very minute distinctions(*n*). The question in each particular instance almost entirely depends on the construction of the particular expression used in wording the undertaking; the general rule necessarily being, that, where the intention of the defendant appears to have been, that he would be answerable *at any time* to the amount mentioned, it is a continuing guaranty —but that where his intention apparently was to limit his liability to a specific transaction, it is not a continuing guaranty.

Continuance of liability.

Thus, where the words were, that the defendant would be liable, "for any debts not exceeding £100, "which J. S. may contract with you for goods "necessary in his business as a jeweller"(*o*) or, "for any goods which he (plaintiff) hath or may "supply J. S. with to the amount of £100"(*p*); —it was held to be a continuing guaranty. So, where the guaranty was "for goods to the amount "of £200 to be delivered according to the custom "of trading between J. S. and the plaintiff," it was

Continuing guaranties.

(*n*) See *per Bayley*, B. 1 Cr. & Mees. 51.

(*o*) *Merle* v. *Wells*, 2 Campb. 413; S. P. *Bastow* v. *Bennett*, 3 Campb. 220.

(*p*) *Mason* v. *Pritchard*, 12 East, 227. These decisions seem to depend upon the use of the indefinite word "any." See 3 Campb. 221.

Continuing guaranties.

held that the £200 was not intended to point out the extent to which the goods should be from time to time supplied under that guaranty, but to indicate the extent to which the surety was willing to pay on his undertaking as a continuing guaranty (*q*). Again, where the guaranty, on the face of it, was expressed to be by way of inducement to the plaintiffs *to continue their dealings* with J. S., it was held to be clearly the intention of the defendant that his guaranty should be continuing until revocation, or further notice (*r*). Where the guaranty expresses that the liability shall be to a certain amount and *during a specified time*, it is a continuing guaranty within such period (*s*).

Non-continuing guaranties.

On the other hand, where the words have reference to a particular dealing between the parties, the guaranty is not continuing. Thus, the words, "I agree to be answerable for the amount of five sacks of flour to be delivered to J. S." (*t*); or, "I engage to guarantee the payment of J. S. to the extent of £60 at quarterly account for

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(*q*) *Hargreave* v. *Smee*, 6 Bingh. 244; S. C. 3 M. & Payne, 573; see 3 Tyrwh. 169, *per Bayley*, B.

(*r*) *Allan* v. *Kenning*, 9 Bingh. 618; S. C. 2 M. & Scott, 769. It seems that a continuing guaranty may be revoked by parol; *Brocklebank* v. *Moore*, 2 Stark. Ev. 371, n. (2nd Ed).

(*s*) *Simpson* v. *Manley*, 2 Tyrwh. 87; S. C. 2 Cr. & J. 13. See *Williams* v. *Rawlinson*, 1 Ry. & M. 233.

(*t*) *Kay* v. *Groves*, 6 Bingh. 276; S. C. 3 M. & Payne, 634; see *Bovill* v. *Turner*, 2 Chit. Rep. 205; *Kirby* v. *Marlborough* (*Duke*), 2 M. & S. 18.

goods to be purchased by him of the plaintiffs" (*u*);—were held insufficient to constitute a continuing guaranty. So, an engagement "to be "answerable for the payment of £50 in case J. S. "does not pay for the gin which he receives "from you," was held not to be a continuing guaranty (*x*). Non-continuing guaranties.

III. The party entering into a guaranty may be discharged from his liability by, 1. Time being given to the principal. 2. *Laches* on the part of the plaintiff. 3. Fraud, or improper dealing between the plaintiff and the principal. 4. Agreement to discharge, before breach. Discharge of surety.

1. It is a general rule in the law of principal and surety, that, by *giving time* to the former, the surety is discharged; on the principle, that by so doing the plaintiff has, unauthorizedly, altered the relative situation of the parties, since the surety can no longer have the same remedy against the principal, as he would have had under the original contract (*y*). By the expression, '*giving time*,' is Giving time to principal.

(*u*) *Melville* v. *Hayden*, 3 B. & A. 593. This case certainly approaches very closely to *Mason* v. *Pritchard*, (ubi supra); for the Court observed that the words "quarterly account" were immaterial; see 3 B. & A. 594. Indeed the only difference seems to be the word "any." Vid. supra, p. 387.

(*x*) *Nicholson* v. *Paget*, 1 Cr. & Mees. 48; S. C. 3 Tyrwh. 164; 5 C. & P. 395.

(*y*) This rule is the same now both at law and in equity. See

Discharge of surety.

meant, "extending the period at which the principal debtor was originally liable, on the contract between them, to pay the creditor, and extending it by a new and valid contract between the creditor and principal debtor, to which the surety does not assent"(*z*). Therefore, where the usual course of dealing between the plaintiff and the principal was to give six months' credit, it was held that, by extending the credit to nine months, the goods to be then paid for by a bill at two (thus virtually giving eleven months credit), the plaintiff had discharged the defendant from liability on his guaranty(*a*). If the guaranty does not specify the terms of credit to be given, it will be held to mean, not the ordinary credit of trade, but such fair and reasonable terms of credit as may be agreed upon between the parties(*b*).

Laches.

2. *Laches* on the part of the plaintiff will exonerate the defendant. Thus, where the defendant undertook to indorse bills given by J. S. to the plaintiffs in payment for goods, provided appli-

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per Lord *Eldon*, Ch., 3 Meriv. 277. *Rees* v. *Berrington*, 2 Ves. Jun. 540; *Nisbet* v. *Smith*, 2 Bro. C. C. 579.

(*z*) *Per Curiam*, 1 Cr. M. & R. 107.

(*a*) *Combe* v. *Woolf*, 8 Bingh. 156; S. C. 1 M. & Scott, 241; *Howell* v. *Jones*, 1 C. M. & R. 97; S. C. 4 Tyrwh. 548; *Samuell* v. *Howarth*, 3 Mer. 272.

(*b*) *Simpson* v. *Manley*, 2 Cr. & Jer. 12; S. C. 2 Tyrwh. 86. See above, p. 385, as to non-compliance with the strict terms and conditions of the contract.

cation was made within convenient and reasonable time, it was held that negligence on the part of the plaintiffs, in suffering an unreasonable time to elapse, discharged the surety (*c*). Where the payment of a bill of exchange given for the price of goods by the vendee is guaranteed by defendant, he is entitled to notice of dishonour, and the want of such notice will exonerate his liability (*d*). But if the defendant is not a party to the bill, and his guarantie extends to the payment generally of the value of the goods themselves, and is not confined to the mere discharge of the security, it seems not necessary to prove notice of dishonour, or even presentment for payment, where the vendee is notoriously insolvent (*e*). And in the case of guaranties in general, notice to the surety, of default made on the part of the principal, is not requisite in order to charge the surety (*f*).

Discharge of surety.

Want of notice.

(*c*) *Payne* v. *Ives*, 3 D. & R. 664. The guaranty, in this case, did not speak of the time of making the application; but the Court held that a reasonable time must be intended. The bills were at 18 months, and 17 months and 10 days were allowed to elapse, and J. S. had become insolvent, before the defendant was applied to.

(*d*) *Philips* v. *Astling*, 2 Taunt. 206.

(*e*) *Holborow* v. *Wilkins*, 2 D. & R. 59; S. C. 1 B. & C. 10. See *Swinyard* v. *Bowes*, 5 M. & S. 62.

(*f*) *Goring* v. *Edmonds*, 6 Bingh. 94; S. C. 3 M. & P. 259; *Peel* v. *Tatlock*, 1 B. & P. 419. The case of bills of exchange seems to be peculiar, on the ground that the party guaranteeing is considered to be somewhat in the situation of an indorser.

Discharge of surety.

Fraud.

3. As *laches* on the part of the plaintiff discharges the surety, so *à fortiori* this will be the effect where actual fraud can be established. Thus, where the defendant agreed to guarantee the payment of the price of certain iron to be delivered to J. S., and a secret bargain was entered into between J. S. and the plaintiff that 10*s. per* ton should be paid beyond the market price, this was held to be such a fraud upon the defendant as to discharge his liability (*g*). On the same principle, if the real object, which the guaranty had in view, be evaded, and the transaction between the plaintiff and the principal be colourable only, the defendant will not be held liable on his guaranty (*h*).

Agreement to discharge.

4. The liability of the surety may be discharged by express agreement between him and the plaintiff, or by the substitution of another contract, before breach; provided that the plaintiff can avail himself of his remedy on the substituted contract (*i*). Thus, where the declaration stated

(*g*) *Pidcock* v. *Bishop*, 3 B. & C. 605; S. C. 5 D. & R. 505. "Such a bargain would have the effect of increasing the surety's responsibility; for, it would compel the vendor to appropriate to the payment of the old debt a portion of those funds, which the surety might reasonably suppose would go towards defraying the debt for the payment of which he made himself collaterally responsible." *Per Abbott*, C. J., 3 B. & C. 609.

(*h*) *Evans* v. *Whyle*, 3 M. & Payne, 137, note (*c*); S. C. M. & Malk. 468; 5 Bingh. 485.

(*i*) See *Case* v. *Barber*, Sir T. Raym. 450.

that the defendant guaranteed the payment of £200 by J. S. for goods to be furnished to the latter, to which defendant pleaded, that, after the making of the promise, and before breach, it was agreed between plaintiff and defendant that the goods should be paid for at the end of three months by a joint bill at four months, accepted by the defendant, which agreement the plaintiff accepted in full discharge of the former undertaking, the plea was held good on demurrer(*k*). And the second agreement, being in fact substituted for the former, and not by way of accord and satisfaction, discharged the former agreement, without allegation or proof of performance(*l*). Discharge of surety.

(*k*) *Taylor* v. *Hilary*, 5 Tyrwh. 373; S. C. 1 C. M. & R. 741.

(*l*) Id. See *per Parke*, B., 5 Tyrwh. 376. *Secus* if it had been after breach. Bac. Abr. *Accord* (A).

CHAP. III.

RIGHTS AND LIABILITIES OF VENDOR IN RESPECT OF AGENTS.

SECTION I.—*Rights and Liabilities of Vendor in respect of his own Agents.*

I. *Rights of Vendor.*

Liability of agent, for loss, &c.

The liability of brokers and factors, in the event of the loss or destruction of goods, seems not to be on the same footing with that of inn-keepers and carriers; the liability of the latter is greater, because it is founded upon a notion of public trust and employment (*a*). A factor is not liable for any accidental loss, and is discharged by such caution, in keeping the property entrusted to him, as a prudent man would exercise in the preservation of his own (*b*). He is justified if he exercise reasonable caution in delegating the goods to another (*c*).

(*a*) Paley, Pr. & A. 16; Jones Bailm. 75; *Coggs* v. *Bernard*, 2 Ld. Raym. 909.

(*b*) *Anon.* 2 Mod. 100; Rol. Abr. 124; *Maltby* v. *Christie*, 1 Esp. 341.

(*c*) *Goswell* v. *Dunkley*, 1 Str. 681; *Bromley* v. *Coxwell*, 2 B. & P. 438.

In case of special authority.

Where a special authority has been given, the agent ought to adhere to it strictly, and if he departs, he will be liable though he acted *bonâ fide* and for the good of his principal(*d*). But he is justified, if the compliance would have been a fraud upon third parties(*e*), or illegal(*f*). And the law exonerates him where he has followed the ordinary usage of trade(*g*), or where he has done everything in his power to comply with the instructions(*h*). In the absence of proof to the contrary, everything necessary will be presumed(*i*).

When he is guilty of *laches*.

If the act of the agent has made the principal liable to a third party, the agent will be liable over to the same amount(*k*). So, where, by omitting to do something which he ought to have done, a loss has been entailed on the principal(*l*). It is the duty of the agent to give early notice to the principal of any loss or casualty, or other circumstance which may render it necessary for particular steps to be taken by the latter for his own security; such as the dishonour of a bill given in payment for goods by the purchaser(*m*), or the insolvency

(*d*) *Catlin* v. *Bell*, 4 Campb. 184.
(*e*) *Bexwell* v. *Christie*, Cowp. 395.
(*f*) See *Glaser* v. *Cowie*, 1 M. & S. 52.
(*g*) Paley, Pr. & A. 9.
(*h*) *Smith* v. *Cadogan*, 2 T. R. 188, n.
(*i*) *Boville* v. *Bradbury*, 1 Stark. N. P. C. 136.
(*k*) See *Green* v. *New River Company*, 4 T. R. 589.
(*l*) *Wallace* v. *Telfair*, 2 T. R. 188, n.; *Lewson* v. *Kirk*, Cro. Jac. 265.
(*m*) Beawes, 431.

Liability of agent.

of the underwriters with whom an insurance had been effected in behalf of the principal (*n*).

In cases where no price is fixed.

Where there is no price fixed, and the factor or general agent has a discretionary power, he ought to sell to the best advantage (*o*). If he has made interest on a balance remaining in his hands, he is liable for it (*p*); and a custom to make a profit by retaining a premium paid on his principal's account cannot be supported (*q*).

Selling on credit.

The agent is justified in selling, according to the ordinary usage of trade, upon credit, if there be no express direction to the contrary (*r*); but he is liable if the vendee was notoriously an irresponsible person (*s*).

Liability for price.

Unless the agent has given improper credit, or has been otherwise guilty of *laches*, he will not be liable for more of the price than he has himself actually received (*t*). But if it is through the neglect or mismanagement of the agent himself that the price has not been received, he will be liable; as, where an auctioneer, without

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(*n*) *Jameson* v. *Swainstone*, 2 Campb. 546, n.

(*o*) Beawes, 43; Paley, Pr. & A. 25.

(*p*) *Rogers* v. *Boehm*, 2 Esp. 704, *per* Lord *Kenyon*, C. J.

(*q*) *Diplock* v. *Blackburn*, 3 Campb. 43; *Massey* v. *Davies*, 2 Ves. Jun. 317.

(*r*) *Anon.* 12 Mod. 514, 515; 2 Mod. 100; *Scott* v. *Surman*, Willes, 404, 407. *Per Chambre*, J., *Houghton* v. *Matthews*, 3 B. & P. 489.

(*s*) *Sadock* v. *Burton*, Yelv. 202; S. C. Bulstr. 103. Molloy, 328.

(*t*) *Varden* v. *Parker*, 2 Esp. 710; *Alsop* v. *Sylvester*, 1 C. & P. 107.

authority, suffers the purchaser to remove the goods without full payment(*u*). Where an agent transfers property under a forged order he is liable in all cases(*x*). And he may become liable by his own act, where he would not otherwise have been so, as by drawing a bill to be accepted by the vendee(*y*); or, by taking a security payable to himself, without disclosing the purchaser's name(*z*). Liability of agent.

A *del credere* agent is liable at all events: because, in consideration of an additional premium, he engages to guarantee the solvency of the debtor(*a*). And such an agent is at the risk of the remittance of the sale money; he cannot, without special authority, invest the proceeds in bills for his principal's account(*b*). If he has taken bills, he is Liability of *del credere* agent.

(*u*) *Brown* v. *Staton*, 2 Chit. Rep. 353.

(*x*) *Forster* v. *Clements*, 2 Campb. 17. See *Marsh* v. *Keating*, 1 Bingh. N. S. 198.

(*y*) *Le Fevre* v. *Lloyd*, 5 Taunt. 749. See *Goupy* v. *Harden*, 7 Taunt. 159; S. C. Holt, N. P. C. 342.

(*z*) *Simpson* v. *Swan*, 3 Campb. 291.

(*a*) *Grove* v. *Dubois*, 1 T. R. 112; *Morris* v. *Cleasby*, 4 M. & S. 566; *Gall* v. *Comber*, 1 B. Moore, 279; S. C. 7 Taunt. 558. "The commission imports, that, if the vendee does not pay, the factor will; it is a guarantee from the factor to the vendor against any mischief to arise from the vendee's insolvency;" see 6 M. & S. 171. But it does not alter the relative situation of the vendor and purchaser: for, "by giving the commission, the vendor means to obtain an additional security, and not to shift the responsibility from the buyer to the factor;" *id.* 172.

(*b*) *Lucas* v. *Groning*, 2 Marsh. 460; S. C. 7 Taunt. 164.

Liability of agent.

liable in the event of their non-payment; for, it seems, that to a certain extent he may be considered the representative of the vendee, in respect of the vendor, and whatever would be required to absolve the vendee himself, is necessary, in order to determine the liability of the *del credere* agent (*c*). He is not indeed to be considered as the principal, because he is never responsible in the first instance; but he is a surety, who on the default of the purchaser is liable in all cases to the vendor-principal (*d*).

Agent cannot himself be the purchaser.

A factor or other agent employed to sell goods cannot himself become the purchaser. "And this is founded upon a plain reason; for, even supposing the possibility of his maintaining a strict impartiality between the two opposite interests, yet the employer has not that for which he bargains in the employment, viz. zeal and vigilance for his exclusive advantage" (*e*). On the same ground, an agent is not justified in depriving his employer of his time and services by devoting them to another (*f*).

(*c*) *M'Kenzie* v. *Scott*, 6 Bro. P. C. 280.

(*d*) See judgment of Lord *Ellenborough*, C. J., *Morris* v. *Cleasby*, 4 M. & S. 566; *Koster* v. *Eason*, 2 M. & S. 112; *Gurney* v. *Sharpe*, 4 Taunt. 242.

(*e*) Paley, Pr. & A. 10, (see the cases cited in note to 3d Ed. p. 11.) And see 31 Geo. II. c. 40, s. 11.

(*f*) *Thompson* v. *Havelock*, 1 Campb. 527.

Where goods are consigned to an agent for sale, it is his duty to account with his principal on demand for such as are sold, to pay over the proceeds, and to deliver the part remaining unsold(*g*). The usual remedy formerly was by action of account, and it was doubted whether assumpsit would lie upon a running account, or where the items were numerous(*h*); but it is now decided that assumpsit may always be maintained upon the balance, however numerous may be the items(*i*). And assumpsit or debt is the proper remedy where the accounts are closed and a balance agreed upon(*k*), even if there had been a covenant to account(*l*). So, assumpsit is the proper remedy to recover back money which has been received by the agent to apply to a particular purpose, where he makes default(*m*); or where the authority is countermanded before execution(*n*), whether

Principal's remedy by action, &c.

(*g*) *Topham* v. *Braddick*, 1 Taunt. 572; *Chedworth* v. *Edwards*, 8 Ves. Jun. 49.

(*h*) *Scott* v. *M'Intosh*, 2 Campb. 238.

(*i*) *Tomkins* v. *Wiltshear*, 5 Taunt. 431; S. C. 1 Marsh. 115; *Arnold* v. *Webb*, 5 Taunt. 432, n. Paley, Pr. & A. 56. If the accounts are intricate and difficult, and the parties cannot agree to refer, a bill in equity is said to be the most usual and suitable proceeding; Paley, 59: but the principal will not be entitled to relief if the matter can be fairly tried at law; *Frietas* v. *Dias Santos*, 1 Y. & J. 574.

(*k*) *Eagle* v. *Vale*, Cro. Jac. 69.

(*l*) *Foster* v. *Allanson*, 2 T. R. 479.

(*m*) *Lincoln* v. *Topliff*, Cro. Eliz. 644; *Scott* v. *Surman*, Willes, 404.

(*n*) *Taylor* v. *Lendey*, 9 East, 49.

Principal's remedy.

the purpose for which the money was received, was legal or illegal(*o*). If the agent sell the goods at an undervalue, the proper remedy is case for the special damage, and not trover to recover the goods themselves(*p*). But trover is maintainable where the goods have been disposed of contrary to the principal's express directions(*q*).

Joint factors.

Joint factors are liable for each other's acts, though one carry on the whole business with the principal's knowledge(*r*).

Subordinate agent.

A subordinate agent is liable only to his immediate employer(*s*).

II. *Rights of Agent.*

The rights of the agent against the principal may be considered under the three following heads: 1. Reimbursement of all necessary expenses. 2. Commission on the sale. 3. Lien on the property consigned to him.

(*o*) The general rule is, that, where money has been deposited for an illegal purpose, the application may be countermanded at any time before the money has been actually applied, and the sum may be recovered back in an action for money had and received, (*Farmer* v. *Russell*, 1 B. & P. 296, *Tennant* v. *Elliott*, 1 B. & P. 3;) although the plaintiff would have had no remedy had the application been actually made, (*Cannan* v. *Bryce*, 3 B. & A. 179.)

(*p*) *Dufresne* v. *Hutchinson*, 3 Taunt. 117.

(*q*) *Powell* v. *Sadler*, Paley Pr. & A. 80; *Payne* v. *Brander*, 2 Stark. N. P. C. 568; *Syeds* v. *Hay*, 4 T. R. 260.

(*r*) *Willett* v. *Chambers*, Cowp. 814; *Goore* v. *Daubeny*, 2 Leon. 75; *Waugh* v. *Carver*, 2 H. Bl. 235.

(*s*) *Cartwright* v. *Hately*, 1 Ves. Jun. 292; *Pinto* v. *Santos*, 5 Taunt. 447; *Schmaling* v. *Thomlinson*, 6 Taunt. 147.

First. The agent is entitled to be reimbursed for all necessary expenses incurred in the execution of his authority; in some cases even where the advance has been made without express directions; for, if the exigency of the particular case has required it, the assent of the principal will be implied from very slight circumstances(*t*). But in general an unauthorized payment is at the risk of the agent himself, unless the principal subsequently affirm the act(*u*); and *à fortiori* the agent has no claim for repayment if the expense has been incurred after express directions to the contrary(*x*). So, the principal cannot be compelled to repay the advances, where the expense has been occasioned by the negligence or unskilfulness of the agent(*y*), or where it has been incurred in the prosecution of an illegal transaction, though undertaken at the express request of the principal himself(*z*). Reimbursement of expenses.

Secondly, The agent is entitled to commission(*a*). Commission.

(*t*) See *per Buller*, J., *Wolfe* v. *Horncastle*, 1 B. & P. 323. *Curtis* v. *Barclay*, 5 B. & C. 141.

(*u*) *French* v. *Backhouse*, *Ditto* v. *Foulston*, 5 Burr. 2727; *Child* v. *Morley*, 8 T. R. 610; *Wilson* v. *Creighton*, cited 1 T. R. 13.

(*x*) *Howard* v. *Tucker*, 1 B. & Adol. 712; *Warwick* v. *Slade*, 3 Campb. 127.

(*y*) *Capp* v. *Topham*, 6 East, 392; *Hurst* v. *Holding*, 3 Taunt. 32. Rol. Abr. 125, pl. 10.

(*z*) *Josephs* v. *Pebrer*, 3 B. & C. 639; *Bayntun* v. *Cattle*, 1 M. & Rob. 265. See *Steers* v. *Lashley*, 6 T. R. 61; *Brown* v. *Turner*, 7 T. R. 630; Ex parte *Mather*, 3 Ves. Jun. 373.

(*a*) See Paley Pr. & A. 100.

Commission.

The amount is either regulated by a particular contract in each particular case (*b*), or determined by the usage of trade (*c*), or settled by particular acts of parliament (*d*). Where there is a particular agreement, it controls the usage of trade; for the maxim is, *conventio vincit legem* (*e*); and if by the terms the amount of the commission is to be left to the principal's discretion, the agent cannot sue the principal for any compensation whatever (*f*). No commission can be recovered where the transaction in which the agent was employed was illegal, as in bargaining for the sale of an office (*g*), or for the sale of shares in an illegal joint-stock company (*h*). But if the adventure be subsequently legalized, the agent will not be barred from recovering his commission (*i*). Where the agent has been guilty of gross negligence in the execution of his authority, he can support no claim

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(*b*) See Paley Pr. & A. 101.

(*c*) See *Eicke* v. *Meyer*, 3 Campb. 412; *Cohen* v. *Paget*, 4 Campb. 96; *Roberts* v. *Jackson*, 2 Stark. N. P. C. 225; *Chapman* v. *De Tastet*, 2 Stark. N. P. C. 294; *Broad* v. *Thomas*, 7 Bingh. 99.

(*d*) See 12 Ann. st. 2. c. 16. s. 2; 31 Geo. II. c. 10, s. 30; 17 Geo. III. c. 26.

(*e*) *Bower* v. *Jones*, 8 Bingh. 65. See 6 T. R. 262.

(*f*) *Taylor* v. *Brewer*, 1 M. & S. 290.

(*g*) *Stackpole* v. *Earle*, 2 Wils. 133. Supra.

(*h*) *Josephs* v. *Pebrer*, 3 B. & C. 639; see *Holland* v. *Hall*, 1 B. & A. 53.

(*i*) *Haines* v. *Busk*, 5 Taunt. 521; S. C. 1 Marsh. 191.

against the principal for commission (*k*); as, where, through default on the part of the agent, his employer derives no benefit from the transaction (*l*); or, where he wilfully acts contrary to the interests of the principal (*m*). Commission.

Thirdly, The agent is entitled to a lien upon all property of the principal in his hands (*n*), and the lien is either general or particular (*o*). It was formerly doubted whether factors and other agents were entitled to any lien for a general balance of account due in respect of prior dealings with the principal; it is now, however, clearly decided that they have such general lien (*p*); but the lien must be claimed in respect of similar dealings between the agent and principal, and not in respect of dissimilar and collateral transactions (*q*). And the debt, in respect of which the lien is claimed by a factor or other agent, must be due to him in his Lien of agent.

(*k*) *White* v. *Chapman*, 1 Stark. N. P. C. 113; *White* v. *Lady Lincoln*, 8 Ves. Jun. 371.

(*l*) *Denew* v. *Daverell*, 3 Campb. 451; *Hammond* v. *Holiday*, 1 C. & P. 384.

(*m*) *Hurst* v. *Holding*, 3 Taunt. 32; *Thompson* v. *Havelock*, 1 Campb. 527.

(*n*) See Paley Pr. & A. 127.

(*o*) Vid. supra, p. 181. 16 Ves. Jun. 280, *per* Lord *Eldon*, Ch.

(*p*) *Kruger* v. *Wilcox*, Ambl. 252; *Man* v. *Shifner*, 2 East, 523; *Curtis* v. *Barclay*, 5 B. & C. 141.

(*q*) *Weldon* v. *Gould*, 3 Esp. 268, *per* Lord *Kenyon*, C. J. *Houghton* v. *Matthews*, 3 B. & P. 494, 5, *per Heath*, J.

Lien.

own right and not as agent for another(*r*). A sub-agent is not entitled to a lien against the principal(*s*).

Agreement not to claim lien.

If, by the terms of the contract between the principal and agent, the lien is relinquished, the agent cannot afterwards insist upon it; as, where the goods were to be sold for the benefit of a particular creditor of the owner(*t*), or, where it was expressly stipulated, that, in the event of the goods remaining unsold, they should be returned to the consignor(*u*).

When the lien attaches.

In order to entitle the agent to a lien, he must have been in possession of the goods(*x*); and the possession must have been obtained by the direction and authority of the principal(*y*). But the intermediate death of the principal, after the consignment and before the arrival, will not divest the factor's lien(*z*). As soon as the agent has parted with the possession of the goods, he is deemed to have given up his lien(*a*); as, by shipping the

(*r*) *Houghton* v. *Matthews*, 3 B. & P. 485.

(*s*) *Manns* v. *Henderson*, 1 East, 335; *Snook* v. *Davidson*, 2 Campb. 218; *Solly* v. *Rathbone*, 2 M. & S. 298.

(*t*) *Weymouth* v. *Boyer*, 1 Ves. Jun. 416.

(*u*) *Walker* v. *Birch*, 6 T. R. 258.

(*x*) *Kinloch* v. *Craig*, 3 T. R. 119, 783; 1 East, 4; *Heywood* v. *Waring*, 4 Campb. 291.

(*y*) *Taylor* v. *Robinson*, 2 B. Moore, 730, *per Eyre*, C. J.; 3 T. R. 787. See *Nichols* v. *Clent*, 3 Price, 547.

(*z*) *Hammonds* v. *Barclay*, 2 East, 227.

(*a*) *Per* Lord *Hardwicke*, Ch., *Kruger* v. *Wilcox*, Ambl. 254. *Per* Lord *Mansfield*, C. J., *Godin* v. *London Ass. Company*, 1 Burr. 494.

goods to the principal or his order(*b*). So, it is a constructive waiver of the lien, if delivery of the goods be demanded, and the goods be claimed to be retained on some other ground(*c*). Lien.

As the power of a factor is a power to sell the goods entrusted to him, he has strictly no power to pledge them; and at common law the transfer to a *bonâ fide* pledgee was ineffectual to transfer any right or interest whatever, even to the amount of the factor's lien against his principal(*d*). But by statute(*e*), an alteration has been introduced. Transfer of lien.

There are three distinct classes of cases relating to the right which the statute gives to a factor to pledge the goods of his principal. The first is, where certain (enumerated) documents for the delivery of goods are deposited or pledged, *without notice by the document or otherwise* that the holder is not the owner of the goods described therein. The second is, where goods are taken in pledge *for a pre-existing debt, without notice.* The third is, where goods are deposited *for advances, with notice.* In the first case, the pledgee acquires a right proportioned to the whole amount of his advances. In the second and third cases, he acquires only such right as the factor possessed at the time of the

(*b*) *Sweet* v. *Pym*, 1 East, 4.
(*c*) *Boardman* v. *Sill*, 1 Campb. 410, n.
(*d*) See above, p. 295, 6.
(*e*) 6 Geo. IV. c. 94, ss. 2, 3, 5. (The Factor's Act).

Lien.

deposit; or, in other words, the lien of the factor is transferred to the pawnee.(*f*).

It is further provided(*g*), that the true owner may recover the goods from the factor or agent before a sale, deposit, or pledge, or from the assignees of the factor or agent in the event of his bankruptcy.

Section II.—*Rights of Vendor in respect of Vendee's Agent.*

General rule.

The general rule is, that where the principal is known, and there is no express engagement with the agent, the latter is not personally liable on the contract(*h*). But it is laid down that the agent may become liable in three cases(*i*).

First, where the principal is not known.

Secondly, where there is no responsible principal.

Thirdly, where the agent binds himself personally.

(*f*) This subject seems more properly to belong to a preceding chapter, as the question, though relating to the factor's power of pledging the goods and transferring his lien thereon, is in effect between the owner and the transferree. See above, Book II. Part 1, Chap. iv. (pp. 295—302,) where the Factor's Act is more fully considered.

(*g*) 6 Geo. IV. c. 94, s. 6.

(*h*) *Owen* v. *Gooch*, 2 Esp. 567; *Goodbaylie's* case, *Dyer*, 230 b. Ex parte *Hartop*, 12 Ves. 352; *Graham* v. *Stamper*, 2 Vern. 146; *De Gaillon* v. *L'Aigle*, 1 B. & P. 368.

(*i*) Paley Pr. & A. 371.

First, where the principal is not known.

Agent not disclosing principal, is liable personally.

In all cases where a factor buys or sells goods, without declaring that he acts as agent, and disclosing the name of the principal, he may be considered the principal, and is in all respects liable as such(*k*). It is not sufficient that the agent was known to act in the character of agent, if the real principal was not disclosed(*l*). And the notification must take place at the time of the contract, in order to discharge the agent (*m*).

Where there is no responsible principal.

Secondly, where there is no responsible principal to resort to, the agent is personally liable(*n*). But an exception is made in the case of public agents; the Governor of Quebec was held not personally liable for goods supplied for the use of the settlement(*o*); so, a commissary general is not liable for forage supplied by his orders(*p*); nor a commanding officer, present with his troop, for necessaries furnished to the men(*q*).

(*k*) *Blackburn* v. *Scholes*, 2 Campb. 343; *Seaber* v. *Hawkes*, 5 M. & P. 549.

(*l*) *Hanson* v. *Roberdeau*, Peake, 120.

(*m*) *Morgan* v. *Corder*, Paley Pr. & A. 372; *Paterson* v. *Gaudassequi*, 15 East, 62.

(*n*) *Horsley* v. *Bell*, Ambl. 769; *Myriel* v. *Hymondsold*, Hardr. 205; *Burls* v. *Smith*, 7 Bingh. 705; *Doubleday* v. *Muskett*, 7 Bingh. 110.

(*o*) *M'Beath* v. *Haldimand*, 1 T. R. 172. See *Unwin* v. *Wolsely*, 1 T. R. 674.

(*p*) *Lutterloh* v. *Halsey*, cited 1 T. R. 180.

(*q*) *Myrtle* v. *Beaver*, 1 East, 135; *Rice* v. *Chute*, id. 579; *Rice* v. *Everitt*, id. 583, n.; *Thompson* v. *Pearce*, 1 B. & B. 25.

Where agent binds himself.

Thirdly, where the agent has bound himself personally, he will be liable though the principal be known; as, where he acknowledges the receipt of goods purchased for his principal, and by the same writing undertakes to pay it by a specified day (*r*); or, where an agent draws a bill generally, and not expressly as a mere agent (*s*); or, where, without indorsing the bill drawn for the price, he undertakes to see it paid (*t*). On this principle it was decided that the defendant, (although he had described himself as "consignee and agent,") having conducted himself throughout the whole transaction as principal, and having signed the agreement in his own name, was personally liable (*u*). So, an agent may render himself liable by expressly warranting the soundness of the goods, if it appear

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(*r*) *Alford* v. *Eglisfield*, Dy. 230, b.; *Talbot* v. *Godbolt*, Yelv. 137; *Haines* v. *French*, Aleyn, 6; *Redhead* v. *Cator*, 1 Stark. N. P. C. 14; *Bell* v. *Kymer*, 5 Taunt. 477; *Appleton* v. *Binks*, 5 East, 148; *Norton* v. *Herron*, Ry. & M. 229; *Burrell* v. *Jones*, 3 B. & A. 47; *Dougal* v. *Kemble*, 3 Bingh. 383; *Benson* v. *Hippius*, 4 Bingh. 455; *Hall* v. *Ashurst*, 1 Cr. & Mees. 714; *Renteria* v. *Ruding*, Lloyd & Welsby, 274. So, the agent may bind himself personally by implication, or according to the usage of trade. "Where a *British* merchant is buying for a *foreigner*, according to the universal understanding of merchants and of persons in trade, the credit is then considered to be given to the British buyer and not to the foreigner;" *per* Lord *Tenterden*, C. J., *Thompson* v. *Davenport*, 9 B. & C. 87.

(*s*) *Leadbitter* v. *Farrow*, 5 M. & S. 345.

(*t*) *Morris* v. *Stacey*, Holt, N. P. C. 153.

(*u*) *Kennedy* v. *Gouveia*, 3 D. & R. 503.

that his own responsibility is pledged (*x*). But even where the undertaking is formally given, if the principal subsequently acknowledges and ratifies it himself, the agent will not be liable (*y*). And where the vendor has in reality given credit to the principal, he cannot afterwards shift his claim so as to charge the agent who gave the order (*z*).

Where agent binds himself.

(*x*) *Per Ashurst*, J., *Fenn* v. *Harrison*, 3 T. R. 761. Vin. Abr. *Actions* (U. b) 1.

(*y*) *Spittle* v. *Lavender*, 2 B. & B. 452; S. C. 5 B. Moore, 270.

(*z*) *Leggatt* v. *Reid*, 1 C. & P. 16, n.; *Hoskins* v. *Slayton*, Ca. temp. Hardw. 376. Supra.

PART IV.

RIGHTS AND LIABILITIES OF VENDEE IN RESPECT OF THIRD PARTIES.

I. PARTNERS OF VENDOR.
II. BAILEES.
III. AGENTS.

CHAP. I.

RIGHTS AND LIABILITIES OF VENDEE IN RESPECT OF PARTNERS OF VENDOR.

I. *Rights of Vendee against Partners.*

Rights of purchaser. Sale by one partner binds the firm.

ONE partner in a firm may bind his co-partners by the transfer of goods. It was agreed by the Court in a very old case, that the sale of one partner is the sale of them both (*a*). And it has been held, that, even after an act of bankruptcy committed by one partner, a *bonâ fide* assignment for valuable consideration of the partnership

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(*a*) *Lambert's case*, Godb. 244, (11 Jac. I.) See *Metcalf* v. *Royal Exchange Assurance Company*, Barnard. Ch. Rep. 343. But if the partner has received the consignment for a different purpose, and the vendee is privy to the misapplication, the sale is not valid. *Snaith* v. *Burridge*, 4 Taunt. 684.

effects, by the solvent partner, was binding on the firm (*b*).

This doctrine holds true as well in the case of goods belonging to a general trading partnership (*c*), as in the case of particular adventures, provided that there is no fraud or collusion on the part of the vendee or pledgee. The plaintiffs purchased, on the joint account of themselves and J. S., a consignment of clover seed, which with the invoice and bill of lading they shipped to J. S. The defendants having no notice of any joint interest in the seed, advanced money to J. S. on the goods being lodged with them; and it was held, that the plaintiffs could not maintain trover for the seed (*d*). The principle was recognised in a recent case. Plaintiffs commissioned a broker to purchase certain goods, in which the broker was to be one-third interested. The whole transaction had been treated by the parties as a joint speculation; and it was accordingly held, that the broker must be considered a partner in the particular adventure, and that the sale or pledge by him, without notice on the part of the vendee or

Both in general partnerships and particular transactions.

(*b*) *Fox* v. *Hanbury*, Cowp. 445. See *Robinson*, ex parte, 1 Mont. & Ayr. 18.

(*c*) Coll. Partn. p. 217.

(*d*) *Raba* v. *Ryland*, Gow, 132; S. P. *Tupper* v. *Haythorne*, Gow, 135, n. (referred to 4 B. & C. 880.) Ex parte *Gellar* in re *Hutchinson*, 1 Rose, Bkcy. Ca. 297.

pledgee, conferred a right on the latter to hold the property against the plaintiffs (*e*).

Distinction between partner and part-owner.

But if the vendor at the time of the transfer was not a *partner* but a *part-owner* (*f*), he is not capable of transferring any interest in the share of the other part-owner, and a sale or pledge by him will affect only his own undivided moiety (*g*). And after a partition has been actually made, the case is still stronger; for the transfer then would be, not of an undivided moiety, but, of a specific chattel, the property in which was vested in another (*h*).

II. *Liability of Vendee to Partners.*

Liability of purchaser to partners of vendor.

Where one of several vendor-partners enters into an agreement with a purchaser on behalf of the partnership, the purchaser is liable to the other co-partners, though he may not have been aware that any partnership subsisted at the time of making the contract (*i*). But if the contract was personal with the individual partner, it cannot be so transferred to a co-partner as to enable the latter

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(*e*) *Reid* v. *Hollinshead*, 4 B. & C. 867; S. C. 7 D. & R. 444.

(*f*) See per *Bayley*, J., 5 B. & A. 402.

(*g*) *Barton* v. *Williams*, 5 B. & A. 395; S. C. (affirmed in error) M'Clel & Y. 406; 3 Bingh. 139; 10 B. Moore, 506.

(*h*) S. C. See *per Abbott*, C. J., 5 B. & A. 402; *per Bayley*, J., ib. 403.

(*i*) *Skinner* v. *Stocks*, 4 B. & A. 437.

to sue the defendant after the partnership has been dissolved; for, it may be that the defendant was induced to enter into the contract by reason of the personal confidence which he reposed in the party with whom he contracted (*k*).

(*k*) *Robson* v. *Drummond*, 2 B. & Adol. 303. See *Davies* v. *Hawkins*, 3 M. & S. 488.

CHAP. II.

RIGHTS AND LIABILITIES OF VENDEE IN RESPECT OF BAILEES.

It has been stated, that as soon as goods sold have been delivered into the custody of a carrier or other bailee, on behalf of the purchaser, the property vests in the purchaser and remains thenceforward at his risk (*a*). It becomes material, therefore, to consider in what cases he has a remedy over against the bailee, in the event of accident or loss (*b*).

(*a*) *Greaves* v. *Hepke*, 2 B. & A. 131; *Walley* v. *Montgomery*, 3 East, 585. Supra, pp. 257, 262.

(*b*) Sir W. Jones, in his Treatise of the Law of Bailments, divides the subject into the following heads:—I. *Depositum*, which is a naked bailment or custody of the goods for the bailor: II. *Mandatum*, or commission: III. *Commodatum*, or loan: (These three are without reward.) IV. *Pignori acceptum*, or pledge: V. *Locatum*, or hiring for reward, which is subdivided into: 1. *Locatio rei*, where the hirer obtains the temporary use of the chattel: 2. *Locatio operis faciendi*, where the bailee for reward performs some work on the chattel, or merely keeps it in his custody on behalf of the bailor; and herein of *Warehousemen*, *Wharfingers*, and the like: 3. *Locatio operis mercium vehendarum*, (which is in fact but a species of the preceding;) wherein of *Carriers*, public and private. The two last-mentioned subdivisions of Locatio, (i. e. bailments for reward received by the bailee,) are the only species of bailment which it is necessary to consider in reference to the present subject.

It must be observed, however, that under certain circumstances the vendor (or his agent) may be made the plaintiff, and in one or two special cases he is the only party who can be made plaintiff. Thus, where by the terms of the agreement it is expressed, that the bailee is to hold the goods on the account of the vendor, the latter has such a special property in the goods as will be sufficient to maintain the action(*c*). So, where the agreement was expressly between the carrier and the consignor, that the latter was to pay for the conveyance, (although such agreement may not necessarily, as between the vendor and vendee, imply that the former is to stand the risk(*d*),) the consignor may bring the action(*e*). So, the action may be brought in the name of the shipper, who is expressed in the bill of lading to have paid the freight(*f*). Again, where the contract was not complete by the delivery to the carrier; as, where goods are forwarded for *sale on approval*(*g*), or, where the property has been prevented by fraud

When vendor may bring the action.

(*c*) *Woodley* v. *Brown*, 1 C. & P. 593.

(*d*) *King* v. *Meredith*, 2 Campb. 639. But if the consignor *was* to be at the risk, the case is stronger, and the consignor *must* be made plaintiff, *Sargent* v. *Morris*, 3 B. & A. 277.

(*e*) *Davis* v. *James*, 5 Burr. 2680; *Moore* v. *Wilson*, 1 T. R. 659. See *Tagliabue* v. *Wynn*, Selw. N. P. 416, (8th Ed.)

(*f*) *Joseph* v. *Knox*, 3 Campb. 320.

(*g*) *Swain* v. *Shepherd*, 1 Moo. & Rob. 223. But see *Haynes* v. *Wood*, Bull. N. P. 36.

Who must be plaintiff.

from vesting in the consignee(*h*), the consignor must be made the plaintiff in an action against the carrier. Where, on the intermediate insolvency of the consignee, the consignor stops the goods *in transitu*, the right revests, and the consignor, (or the party to whom he indorses the bill of lading,) may sue the captain or ship-owner who detains the goods(*i*). So, where the consignee has prevented the property from vesting in himself, by a refusal to fulfil his part of the stipulated contract(*k*), or, where the contract has been mutually rescinded by the parties before the arrival of the goods(*l*), the consignor must necessarily be the plaintiff in an action against the bailee.

General rule that vendee must be the plaintiff.

On the other hand, where the vendee orders the goods to be sent by a particular carrier, the property vests in him immediately on the delivery to the carrier, and remains thenceforth at his risk; the action therefore against the bailee can clearly be in the name of the vendee only (*m*). So, where goods consigned to a merchant abroad, are expressed in the bill of lading to be shipped by order

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(*h*) *Duff* v. *Budd*, 6 B. Moore, 469; S. C. 3 B. & B. 177. *Stephenson* v. *Hart*, 4 Bingh. 476; S. C. 1 M. & P. 357.

(*i*) *Morison* v. *Gray*, 2 Bingh. 260; *Thompson* v. *Trail*, 6 B. & C. 36. Supra.

(*k*) *Brandt* v. *Bowlby*, 2 B. & Ad. 932.

(*l*) *Richardson* v. *Goss*, 3 B. & P. 119.

(*m*) *Dawes* v. *Peck*, 8 T. R. 330. 2 Wm's. Saund. 47 k.

and on account of the consignee, in an action against the ship-owner the consignee must be the plaintiff(*n*). And it is now clearly settled, that, even where no particular mode of conveyance is directed, the delivery to a carrier will vest the property in the purchaser(*o*); who ought therefore in all cases (except in the few special cases above adverted to) to be the plaintiff(*p*). Who must be plaintiff.

The liability of a common carrier differs in several respects from that of other bailees, and may therefore be more conveniently considered under a separate head.

I. BAILEES GENERALLY(*q*).

A warehouseman, or other bailee of the like description, is only bound to take such reasonable Warehouseman or similar bailee.

(*n*) *Brown* v. *Hodgson*, 2 Campb. 36; *Moores* v. *Hopper*, 2 N. R. 411.

(*o*) *Dutton* v. *Solomonson*, 3 B. & P. 582; *Godfrey* v. *Turzo*, 3 P. Wms. 185.

(*p*) *Snee* v. *Prescott*, 1 Atk. 248; *Jacobs* v. *Neilson*, 3 Taunt. 423; *Fragano* v. *Long*, 6 D. & R. 283; S. C. 4 B. & C. 219; *Evans* v. *Martlett*, 1 Ld. Raym. 271; *Colston* v. *Woolston*, Selw. N. P. 1370, (8th Ed.)

(*q*) Under this head are intended to be included only bailees for reward for the custody of goods,—falling within that species of *locatio*, called *locatio operis faciendi*. It has been already observed, that, in strictness, the *locatio* of carrying of goods is but a species of the same; but as the law varies in respect of each, it is more convenient to consider them as distinct from each other. See above, p. 414, note (*b*).

Duty. care of the goods entrusted to him, as he ought to do of his own, and he is not liable for loss or damage arising from accident, without negligence on his own part(*r*). He is bound, however, to take as great precautions as in the case of his own property(*s*).

Jus tertii. A warehouseman, or wharfinger, receiving goods to hold on behalf of the plaintiff, is not estopped from setting up the right of a third party(*t*). Otherwise, if he has actually acknowledged that he holds them for the plaintiff;—as, where he gives a written acknowledgment to the seller, that he holds the consignment on account of the purchaser(*u*). And

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(*r*) *Cailiff* v. *Danvers*, Peake, 114; *Finucane* v. *Small*, 1 Esp. 315; *Longman* v. *Calini*, Abb. Shipp. 270, n.; *Southcote's* case, 4 Co. Rep. 83b; *Lane* v. *Cotton*, 1 Comyn, Rep. 100; *Coggs* v. *Bernard*, 2 Ld. Raym. 913. Sir W. Jones mentions three degrees of neglect;—1. *Culpa lata*, gross neglect, which is the omission of that care which even inattentive and thoughtless men never fail to take of their own property; amounting, therefore, almost to a violation of good faith. 2. *Culpa levis*, ordinary neglect, which is the want of that diligence which the generality of mankind use in their own concerns. 3. *Culpa levissima*, slight neglect, which is the omission of that care which very attentive and vigilant persons take of their own goods. Bailm. p. 21, 22, 118. See 1 Moo. & Payne, 586. It is for the second degree of neglect that bailees for hire are liable.

(*s*) *Clarke* v. *Earnshaw*, Gow, 30.

(*t*) *Ogle* v. *Atkinson*, 1 Marsh. 323; S. C. 5 Taunt. 759.

(*u*) *Stonard* v. *Dunkin*, 2 Campb. 344; *Gosling* v. *Birnie*, 7 Bingh. 339; S. C. 5 M. & P. 160. See *Harman* v. *Anderson*, 2 Campb. 243; *Anon.*, cited 3 Esp. 115; *Smith* v. *Cook*, 2 C. & P. 276. See 1 Esp. 342.

it is immaterial whether the goods were in his possession at the time of making the acknowledgment, or whether they did not arrive until afterwards(*x*). But if his acknowledgment, and the promise to deliver the goods to the plaintiff, are conditional or qualified, trover cannot be supported unless the terms have been complied with(*y*). Acknowledgment.

A consignee cannot, in general, maintain trover against the bailee, until he has paid all the expenses to which he is liable in respect of them(*z*). Nor can he maintain trover against a bailee in whose custody the goods are placed, if the transfer of property (as between the vendee and vendor) has not been so far completed as to have enabled him to support trover against the vendor, had the goods remained in the possession of the latter. Thus, the vendee cannot maintain trover against a wharfinger with whom the goods are deposited, as long as anything remains to be done, which may affect the quantity of the goods agreed to be delivered(*a*). But if the bailee has accepted the When trover maintainable.

(*x*) *Holl* v. *Griffin*, 10 Bingh. 246; S. C. 3 M. & Sc. 732.

(*y*) *Melling* v. *Kelshaw*, 1 Cr. & Jer. 184; S. C. 1 Tyrwh. 109.

(*z*) See *Holderness* v. *Shackels*, 8 B. & C. 612. The plaintiff in this case was not a vendee, but the principle is obviously applicable.

(*a*) *Wallace* v. *Breeds*, 13 East, 522. On this subject, Trover by Vendee against Vendor may be referred to. (See pp. 310, 314, et seq.; and cases there cited.) For when the real question is between the vendor and purchaser, it is obviously immaterial

Action against bailee.

order generally, he cannot afterwards set up as a defence that the goods were not selected and appropriated at the time(*b*).

Lien of bailee.

A bailee is entitled, independently of any special contract, to a particular lien upon the property in his hands(*c*). But he cannot claim to retain the goods upon a general lien against the owner, except where the right arises out of a contract express or implied(*d*). It was once held, that every special agreement was an implied waiver of any right of lien to which the party might be entitled; but it was afterwards decided, that a special agreement did not of itself destroy the right(*e*). If, however, it contains any provision inconsistent with the right, the lien cannot be claimed(*f*). Therefore, where the usage was proved to be, that the importer was allowed a certain time to pay the wharfage dues, whether the goods were removed in the meantime

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whether the vendor or a bailee may happen to be defendant in the action.

(*b*) *Gillett* v. *Hill*, 4 Tyrwh. 290. For, by *attorning*, as it were, to the order, the bailee is estopped from afterwards denying his liability; as a lessee cannot dispute the title of his lessor.

(*c*) *Skinner* v. *Upshaw*, 2 Ld. Raym. 752; *Yorke* v. *Greenaugh*, id. 866; *Gray* v. *Chamberlain*, 4 C. & P. 260.

(*d*) *Holderness* v. *Collinson*, 7 B. & C. 212; *Rushforth* v. *Hadfield*, 6 East, 519; *Ditto* v. *Ditto*, 7 East, 224; *Wright* v. *Snell*, 5 B. & A. 350; *Butler* v. *Woolcott*, 2 N. R. 64.

(*e*) *Chase* v. *Westmore*, 5 M. & S. 180. Supra, p. 183.

(*f*) Ib.

or not, it was held, that the bankruptcy of the importer before the delivery to the vendee gave the wharfinger no right of lien against the latter (*g*). Lien.

II. CARRIERS.

It is enacted by a recent statute, that no common carrier by land shall be liable for the loss of, or injury to, certain articles of property (enumerated in the Act), if the value exceed £10, unless at the time of delivery the value and nature be declared, and an increased charge be accepted (*h*). The carrier may in such cases demand an increased rate of charge, provided that he affixes, in a conspicuous part of his office or warehouse, the amount of such increased rates (*i*); and provided that, if required, he gives an acknowledgment of the receipt of the property, and the payment of the increased rate (*k*). Nothing contained in the Act is to affect any special contract, in respect of the conveyance of the goods, between the party and the carrier (*l*); and nothing in the Act shall be deemed to protect the carrier from the felonious acts of his servants, nor a servant from personal liability arising from his own neglect or misconduct (*m*). Carriers. Liability by statute.

(*g*) *Crawshay* v. *Homfray*, 4 B. & A. 50.

(*h*) 11 Geo. IV. & 1 Will. IV. c. 68, s. 1. See *Owen* v. *Burnett*, 4 Tyrwh. 133; *Mayhew* v. *Nelson*, 6 C. & P. 58.

(*i*) Id. section 2. [See a Form given 4 Tyrwh. 134, n.]

(*k*) Id. section 3.

(*l*) Id. section 6.

(*m*) Id. section 8.

Liability at common law.

The common law liability of a common carrier seems to be nearly as great as that of an insurer, and much greater in degree than the liability of a common bailee. He is liable for loss or damage in all cases, though negligence cannot be proved against him, unless the injury be occasioned by the act of God, or of the king's enemies(*n*). And if the defendant is not a common carrier by trade, but by his own special agreement puts himself into the situation of a common carrier, he will be liable as such(*o*). He is responsible in general for the loss of goods delivered to his servant, or authorized agent(*p*), unless the contract with the servant was personal only(*q*).

Effect of notice limiting liability.

It was held at common law, that a carrier might, by notice, limit to any extent, or even totally exclude, all responsibility on his part for loss or

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(*n*) Jones, Bailm. 104; *Mors* v. *Slue*, Sir T. Raym. 220; *Dale* v. *Hall*, 1 Wils. 281; *Gibbon* v. *Paynton*, 4 Burr. 2298; *Goff* v. *Clinkard*, 1 Wils. 282; *Forward* v. *Pittard*, 1 T. R. 27; *Hyde* v. *Trent and Mersey Navigation Company*, 5 T. R. 389.

(*o*) *Coggs* v. *Bernard*, 2 Ld. Raym. 909, S. C. Holt, 131, Comyn, Rep. 133; *Lovett* v. *Hobbs*, 2 Show. 127, 128; *Gisbourne* v. *Hurst*, 1 Salk. 249; *Robinson* v. *Dunmore*, 2 B. & P. 419, *per Chambre*, J. *Maving* v. *Todd*, 1 Stark. N. P. C. 72; S. C. 2 Campb. 225.

(*p*) *Williams* v. *Cranston*, 2 Stark. N. P. C. 82; *Colepepper* v. *Good*, 5 C. & P. 380.

(*q*) *Butler* v. *Basing*, 2 C. & P. 613.

damage to the property(*r*). But it is now provided by the statute already cited, that no notice shall limit or in any way affect the common law liability of any carriers, in respect of any articles to be conveyed by them; but they shall be liable as at common law for any goods in respect whereof they may not be entitled to the benefit of the Act(*s*). Notice limiting liability.

Where the carrier or his servant was guilty of gross negligence, he would be liable before the statute, even if the case came within the terms of his notice(*t*). As where the charge had been entrusted by the carrier to an inadequate number of persons(*u*); or, to one of dubious character(*x*); or to one incompetent at the time to the trust, from inebriety, or similar cause(*y*); or, where any What countervailed the effect of notice.

(*r*) *Maving* v. *Todd*, 1 Stark. N. P. C. 72; *Harris* v. *Packwood*, 3 Taunt. 264; *Hutton* v. *Bolton*, 3 Dougl. 59; *Butler* v. *Fisher*, Peake, Add. Ca. 183.

(*s*) 11 Geo. IV. & 1 Will. IV. c. 68, s. 4. [The articles are specified in the first section.]

(*t*) *Birkett* v. *Willan*, 2 B. & A. 356; *Nicholson* v. *Willan*, 5 East, 507; *Beck* v. *Evans*, 16 East, 244; *Duff* v. *Budd*, 6 B. Moore, 469; *Lowe* v. *Booth*, 13 Price, 329; *Sleat* v. *Fagg*, 5 B. & A. 342; *Brooke* v. *Pickwick*, 4 Bingh. 218; *Siordet* v. *Hall*, 4 Bingh. 607; S. C. 1 M. & P. 561.

(*u*) *Beckford* v. *Crutwell*, 5 C. & P. 242; S. C. 1 M. & Rob. 187; *Smith* v. *Horne*, 8 Taunt. 144; S. C. Holt, 643.

(*x*) See *Macklin* v. *Waterhouse*, 5 Bingh. 212; S. C. 2 M. & P. 319.

(*y*) *Bodenham* v. *Bennett*, 4 Price, 31.

Laches.

culpable carelessness was proved against the carrier, his agent or servant(*x*). So, where the carrier undertook to carry the goods to a certain place, and deviated from the voyage without sufficient cause(*a*), or carried the goods beyond the appointed place of delivery(*b*), in the event of loss he would be liable, even though no want of due care could be proved against him.

Cancelling of liability by act of owner.

But if any act of interference on the part of the plaintiff himself, has led directly or indirectly to the loss of the property, the carrier's liability is discharged(*c*). The mere circumstance, however, that the plaintiff has exercised some care and superintendence over his property entrusted to the carrier, does not absolve the latter from his liability(*d*); unless indeed he has so far interfered that the goods cannot be considered to have been in the possession of the carrier at all(*e*). The carrier cannot defend himself on the ground of any default on the part of the plaintiff, which he did not object

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(*x*) *Langley* v. *Brown*, 1 M. & P. 583; *Garnett* v. *Willan*, 5 B. & A. 53.

(*a*) *Davis* v. *Garrett*, 4 M. & P. 540; S. C. 6 Bingh. 716.

(*b*) *Ellis* v. *Turner*, 8 T. R. 531.

(*c*) *Miles* v. *Cattle*, 6 Bingh. 743; S. C. 4 M. & P. 630. So, where the delivery was caused by some omission on the part of the consignee, the ship-owner will not be liable: *Shirwell* v. *Shaplock*, 2 Chit. Rep. 397.

(*d*) *Robinson* v. *Dunmore*, 2 B. & P. 416; *Calye's* case, 8 Co. Rep. 33.

(*e*) *East India Company* v. *Pullen*, 1 Stra. 690.

to at the time(*f*). But if the plaintiff has been guilty of gross and culpable neglect(*g*), or of fraud or unfair concealment(*h*), he cannot recover in an action against the carrier. Cancelling of liability.

If the carrier assent to an order given to him respecting the delivery of the goods, even before the goods are actually given into his custody, he will be bound to comply with the terms of such order(*i*). In general it is his duty actually to deliver the goods at their place of destination(*k*), perhaps even the residence of the consignee(*l*). His liability will not be discharged by delivering them at an intermediate place, such as a wharf or warehouse, which he is in the habit of using(*m*), even when the consignee is cognizant of the fact, that as between the carrier and the owner of the warehouse, his journey is considered to be at an end there, and that the profits of the further carriage are allowed by the carrier to another person(*n*). Discharge of liability by performance.

(*f*) *Stuart* v. *Crawley*, 2 Stark. N. P. C. 323.

(*g*) *Bradley* v. *Waterhouse*, Dan. & Lloyd, Merc. Ca. 1; S. C. 3 C. & P. 318, M. & Malk. 154.

(*h*) *Mayhew* v. *Eames*, 3 B. & C. 601; S. C. 5 D. & R. 484; *Edwards* v. *Sherratt*, 1 East, 604; *Izett* v. *Mountain*, 4 East, 370; *Clay* v. *Willan*, 1 H. Bl. 298.

(*i*) *Streeter* v. *Horlock*, 1 Bingh. 34.

(*k*) *Golden* v. *Manning*, 2 Bl. Rep. 916; S. C. 3 Wils. 429; *Griffiths* v. *Lee*, 1 C. & P. 110.

(*l*) *Stoer* v. *Crowley*, 1 M'Clel. & Y. 129; *Vid. per Curiam.*

(*m*) *Wardell* v. *Mourillyan*, 2 Esp. 693.

(*n*) *Hyde* v. *Trent and Mersey Navigation Company*, 5 T. R. 389. In this case, indeed, the defendants were held liable at all

Discharge of liability.

If the carrier deliver the goods at a different direction from that specified, though he may have been innocently induced to do so by a fraud practised on the consignor by a third party, the consignor may recover the value against the carrier (*o*).

Form of action.

Where the carrier has lost the goods, a special action on the case is the proper remedy, and trover will not lie (*p*). Nor can trover be supported for a mere omission to deliver, without an actual demand and refusal to evidence a conversion (*q*). But trover may be maintained for a misdelivery, though such misdelivery were occasioned by mistake (*r*); or, for delivering on a forged order (*s*); or, for an absolute refusal to deliver (*t*).

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events on their special undertaking. The Court expressed some doubts upon the general question; but all the judges (with the exception of Lord Kenyon, C. J.) were strongly inclined in favour of the liability. If the warehouse belong to the carrier, the nature of his subsequent liability is varied accordingly; for he is thenceforth liable as warehouseman, and not as carrier; *Garside* v. *The same Company*, 4 T. R. 581.

(*o*) *Duff* v. *Budd*, 6 B. Moore, 469; S. C. 3 B. & B. 177; *Stephenson* v. *Hart*, 4 Bingh. 476; *Lubbock* v. *Inglis*, 1 Stark. N. P. C. 104. Supra.

(*p*) *Owen* v. *Lewyn*, 1 Ventr. 223; *Anon.* 2 Salk. 655; *Ross* v. *Johnson*, 5 Burr. 2825. Bull. N. P. 44, 5; *Kirkman* v. *Hargreaves*, Selw. N. P. 419, (8th Ed.)

(*q*) *Severin* v. *Keppell*, 4 Esp. 157; *Attersol* v. *Briant*, 1 Campb. 409; *Alexander* v. *Southey*, 5 B. & A. 247.

(*r*) *Youl* v. *Harbottle*, Peake, 49; *Devereux* v. *Barclay*, 2 B. & A. 702.

(*s*) *Lubbock* v. *Inglis*, 1 Stark. N. P. C. 104.

(*t*) *Thompson* v. *Trail*, 6 B. & C. 36; *Dewell* v. *Moxon*, 1 Taunt. 391; *Syeds* v. *Hay*, 4 T. R. 260.

The plaintiff must give some proof of damage sustained. It is enacted by the statute above cited, that the carrier shall not be concluded by the declared value of the goods, but shall be liable only to such amount as may be proved not exceeding the declared value(*u*). Where the plaintiff has paid an increased rate of charges, he is entitled to recover back such extra charges, in addition to the value of the lost property(*x*). If no special proof of the nature and the value of the property can be given by the plaintiff, the judge will direct the jury to allow reasonable damages(*y*). Amount of damages.

(*u*) 11 Geo. IV. & 1 Will. IV. c. 68, s. 9.
(*x*) Id. section 7.
(*y*) *Butler* v. *Basing*, 2 C. & P. 613.

CHAP. III.

RIGHTS AND LIABILITIES OF VENDEE IN RESPECT OF AGENTS.

I. *Rights of Vendee.*

Duty of agent.

IT is laid down, that, if an agent, in the execution of a commission to purchase, deviate from his orders in price, quality, or kind; or if, after the goods are bought, he sends them to a different place from what he was directed,—the goods must remain to his own account, unless the merchant, on advice of the circumstances, admit them according to his first intention(*a*). However, the principal must notify his rejection of the contract within a reasonable time, otherwise it will be presumed that he has adopted it(*b*). The principal may reject the contract, and, instead of returning the goods to his factor, undertake to dispose of them as agent for the latter(*c*). But it seems that this would be allowable only in cases where it is impossible to return the goods without loss, and where the party acts prudently and for the benefit

(*a*) Beawes, 43; Malyne, 82; Paley, Pr. & A. 28.
(*b*) *Cornwall* v. *Wilson*, 1 Vez. 509.
(*c*) *Prince* v. *Clarke*, 1 B. & C. 186; S. C. 2 D. & R. 266.

of the consignor(*d*). And if the principal elect to proceed in this manner, he must decisively reject the contract; for he will not be allowed, after endeavouring to turn the goods to account, to return them upon the factor's hands(*e*). Remedy of principal.

The factor is not justified in being himself the seller of the goods which he undertakes to purchase for his principal(*f*), nor in buying on his own account what he ought to have bought for his principal. "If one buy up goods which he ought to furnish as a factor, and instead of charging factorage duty, or accepting a stipulated salary, he take the profits, and deal with his constituent as a merchant, this is a fraud for which an account is due"(*g*). But it is no objection that the contract note merely mentions the agent's name as the purchaser, if the purchase is in effect on behalf of the principal(*h*). Factor cannot himself be the seller.

As to the rights of the vendee against the vendor's agent,—the general rule is, that, in the absence of any personal undertaking on the part of the agent, he will not be responsible(*i*). So it Agent of vendor.

(*d*) *Kemp* v. *Prior*, 7 Ves. Jun. 240.

(*e*) *Cornwall* v. *Wilson*, 1 Vez. 509. Paley, Pr. & A. 31.

(*f*) *Massey* v. *Davies*, 2 Ves. Jun. 217. *Vid. ante.*

(*g*) *East India Company* v. *Henchman*, 1 Ves. Jun. 289, *per* Lord *Thurlow*, Ch. Paley, Pr. & A. 33.

(*h*) *Kemble* v. *Atkins*, 7 Taunt. 260, S. C. Holt, N. P. C. 427, 1 B. Moore, 6.

(*i*) See above, p. 406.

Personal liability of agent.

is said in Viner(*k*): "If the servant of a taverner sells wine that is corrupted, knowing it to be so, action of deceit does not lie against the servant; for he did it but as servant." But otherwise if the servant expressly warranted on his own affirmance(*l*).

II. *Rights of Agent.*

Agent may bring action.

Every agent, who has a special property in goods entrusted to him, may bring an action in his own name against the purchaser(*m*); thus, an auctioneer may bring the action on the contract, though the goods were known to belong to the principal, and the sale took place on the premises of the owner(*n*). And brokers may maintain an action for their own benefit, where the contract of sale was in their own name, but on the account of a principal who subsequently repudiated the contract(*o*). If the vendor-principal cannot make out a title to the goods, and the true owner asserts his claim, the purchaser is not liable at the suit of the agent(*p*).

(*k*) Vin. Abr. *Actions* (T. b.).

(*l*) Vin. Abr. *Actions* (U. b.) 1, *Broking* v. *Came*. Bro. Abr. *Disceit*, pl. 29, cites 11 E. 4. 6. See 1 Campb. 362.

(*m*) Paley, Pr. & A. 361; Bull. N. P. 130. *Gardiner* v. *Davis*, 2 C. & P. 49. See *Sadler* v. *Leigh*, 4 Campb. 195; *per* Lord *Alvanley*, C. J., *Houghton* v. *Matthews*, 3 B. & P. 495; *Atkyns* v. *Amber*, 2 Esp. 493; *Joseph* v. *Knox*, 3 Campb. 320.

(*n*) *Williams* v. *Millington*, 1 H. Bl. 81.

(*o*) *Short* v. *Spackman*, 2 B. & Ad. 962.

(*p*) *Dickenson* v. *Naul*, 4 B. & Ad. 638.

As factors and other agents have a particular lien upon the goods they are appointed to sell, they are entitled to recover such amount out of the price; and the buyer cannot defend himself from the claim on the ground that the vendor-principal is indebted to him in a greater sum, which debt he sets off against the price; because the principal himself can never say that, except when there is nothing due to the factor(*q*). It is immaterial that, at the time of the contract, the factor dealt expressly as agent, and not as principal(*r*). If, however, the buyer settles for the price of the goods with the principal, without notice of the agent's claim, he will be discharged absolutely(*s*). Lien.

(*q*) *Drinkwater* v. *Goodwin*, Cowp. 256: See *per* Lord *Mansfield*, C. J.

(*r*) *Atkyns* v. *Amber*, 2 Esp. 493.

(*s*) *Coppin* v. *Walker*, 7 Taunt. 237; *Coppin* v. *Craig*, 7 Taunt. 243; S. C. 2 Marsh. 501.

APPENDIX (A).

The following cases have appeared since the greater part of the preceding pages were sent to press.

See p. 18.—*Infant.*] It was decided that a "stanhope" could not be deemed a necessary for the defendant, a minor, who had held a commission in the army. *Charters* v. *Bayntun*, 7 C. & P. 52.

See p. 31.—*Married Woman.*] As to the implied assent of the husband to a contract entered into by the wife, see *Farmer* v. *Lynn*, 4 Nev. & Man. 559.

See p. 67.—*Note or memorandum within the Statute of Frauds.*] A correspondence between the defendant and the plaintiff was allowed to be connected with a prior memorandum of the contract signed by the plaintiff only, so as to constitute a sufficient memorandum of the agreement. Lord *Denman*, C. J. delivering the judgment of the Court, said (5 N. & M. 260): "The cases on this subject are not at first sight uniform; but on examination it will be found that they establish this principle,—that, where a contract or note in writing exists, which binds one party, any subsequent note in writing, signed by the other, is sufficient to bind him, *provided it either contains in itself the terms of the contract, or refers to any writing which contains them.*" *Dobell* v. *Hutchinson*, 5 Nev. & Man. 251. K. B. Trin. T. 1835.

See p. 91.—*Treating Act.*] Add to note (*h*), *Thomas* v. *Herries*, 6 C. & P. 615.

See p. 94.—*Tippling Act.*] Lord *Abinger*, C. B., was of opinion, that the statute 24 Geo. II. c. 40, was not intended to apply to cases where spirits are supplied by an inn-keeper to guests resident at his hotel. *Proctor* v. *Nicholson*, 7 C. & P. 67.

See p. 154.—*Mis-statement in particulars of sale.*] Material mis-description makes the sale void, although one of the conditions provide that a mistake or error should not vitiate the sale, but should be the subject of a compensation. *Dobell* v. *Hutchinson*, 5 Nev. & Man. 251. K. B. Trin. T. 1835.

See p. 198.—*Stoppage in transitu.*] Add to note (*s*), *Slater* v. *Le Fevre*, 7 C. & P. 91.

See p. 220.—*Stamp—Agreement for the sale of goods.*] It was suggested above [p. 220, note (*b*)] that an agreement for the sale of a chattel not *in esse* at the time of the contract, was to be deemed an agreement for the sale of goods, wares, and merchandise within the exemption of 55 Geo. III. c. 184, and that the case of *Buxton* v. *Bedall* (3 East, 303) could not be supported. The point has been actually so determined in the Exchequer, and the last-mentioned case is overruled. The Court decided, that a contract to make a printing-press within three months, was an agreement relating to the sale of goods, and did not require a stamp. *Pinner* v. *Arnold*, 1 Tyrwh. & Grang. 1. Exch. Mich. T. 1835.

See p. 259.—*Goods sold.—Implied agency.*] Wife carrying on trade in behalf of her husband (a bankrupt). *Smallpiece* v. *Davies*, 7 C. & P. 40. And see *Farmer* v. *Lynn*, 4 Nev. & Man. 559.

See p. 285.—*Pleading.*] In an action on a guaranty, *non assumpsit* admits that the goods were supplied. *Taylor* v. *Hillary*, 7 C. & P. 30.

See p. 285.—*Form of plea under new rules.*] The Court of Exchequer declared that the form of a plea given by Rules

Hil. T. 4 Will. IV. (the plea was *nil debuit*, in debt,) must be literally adhered to. The plaintiff, however, had leave to amend on an affidavit of merits. *Smedley* v. *Joyce*, 1 Tyrwh. & Grang. 84. Exch. Mich. T. 1835.

See p. 286.—*Pleading—Non assumpsit.*] Although the illegality of the contract cannot be given in evidence without a special plea, the defendant is not bound to plead a matter *which is made necessary by a statute in order to entitle the plaintiff to recover*. Thus, where the plaintiff brought an action to recover the amount of an apothecary's bill, and the defendant pleaded *non assumpsit*, it was held that under this plea the defendant might take the objection that the plaintiff had not (in conformity with the statute 55 Geo. III. c. 194, s. 21,) practised as an apothecary prior to or on the 5th day of August, 1815, *or* obtained a certificate to practise as an apothecary. Such an objection is in fact founded on a defect in evidence on the part of the plaintiff, and not on a matter which the defendant ought to have pleaded. *Morgan* v. *Ruddock*, 4 Dowl. P. C. 311. K. B. Mich. T. 1835.

See p. 287, et seq.—*Pleading—Replication.*] Since the New Rules, as special matter must always be pleaded, it has become usual to reply *de injuriâ* in assumpsit. *Semble*, that such replication is subject to the same rules as the replication *de injuriâ* in trespass, and is therefore inadmissible when the plea claims an interest in the subject-matter of the action, or alleges an authority derived from the plaintiff.

[The main ground of the decision was, that the replication could not be supported, because the plea was not in *excuse*, but in *denial*. It may be observed, that the plaintiff had also new assigned that the action was brought not only for the proceeds of the goods in the introductory part of the plea mentioned, but also for the proceeds of certain other goods. The Court seemed to think that the new assignment might have been supported.] *Solly* v. *Neish*, 4 Dowl. P. C. 248. Exch. Trin. T. 1835.

See p. 290, note (*s*).—*Pleading.*] Evidence of payment admissible in reduction of the plaintiff's demand (though not in bar of the action), where there is no plea of payment. *Lediard* v. *Boucher*, 7 C. & P. 1. See id. 2 n.

See p. 307.—*Assumpsit for not delivering goods.*] Where the agreement was, that the defendant should sell, and the plaintiff should purchase, all the salt manufactured at the salt-works of defendant, with a proviso that the contract should terminate on the *insolvency* of the plaintiff, it was held that the term 'insolvency' was to be taken in its ordinary, and not in its technical, sense, and that the defendant was not liable for refusing to deliver the salt manufactured at his works, after the plaintiff had become unable to pay his debts, although he had not become insolvent under the provisions of the statute for the relief of insolvent debtors. *Parker* v. *Gossage*, 1 Tyrwh. & Grang. 105. Exch. Mich. T. 1835.

APPENDIX (B).

Form of common counts for goods sold, and on account stated, under Rule Trin. T. 1 Will. IV.

"In K. B. [*or* C. P., *or* Exch. of Pleas.]

—— day of ——, in the year of our Lord 18—.

Middlesex } A. B. by J. S. his attorney [*or* 'in his own proper
to wit: } person'] complains of C. D. who has been summoned to answer the said plaintiff in an action on promises: For that whereas the defendant on the —— day of ——, in the year of our Lord 18—, was indebted to the plaintiff in £——, for the price and value of goods then bargained [*or* sold] and sold [*or* delivered] by the plaintiff to the defendant at his request: And in £—— for money found to be due from the defendant to the plaintiff on an account then stated between them. And whereas the defendant afterwards, on the day and year aforesaid, in consideration of the premises respectively, promised to pay the said several monies respectively to the plaintiff on request: Yet he hath disregarded his promises, and hath not paid any of the said monies or any part thereof. To the plaintiff's damage of £——, and thereupon he brings suit &c."

With the above the plaintiff must deliver particulars of his demand. It is ordered, "That with every declaration, if de-
"livered, or with the notice of declaration, if filed, containing
"counts in indebitatus assumpsit or debt on simple contract,
"the plaintiff shall deliver full particulars of his demand under

" those counts, where such particulars can be comprised within " three folios; and, where the same cannot be comprised within " three folios, he shall deliver such a statement of the nature of " his claim, and the amount of the sum or balance which he " claims to be due, as may be comprised within that number of " folios. And to secure the delivery of particulars in all such " cases, it is further ordered, that, if any declaration or notice " shall be delivered without such particulars, or such statement " as aforesaid, and a judge shall afterwards order a delivery of " particulars, the plaintiff shall not be allowed any costs in " respect of any summons for the purpose of obtaining such " order, or of the particulars he may afterwards deliver: And " that a copy of the particulars of the demand, and also " particulars (if any) of the defendant's set-off, shall be annexed " by the plaintiff's attorney to every record at the time it is " entered with the judge's marshal." Rules Trin. T. 1 Will. IV. PRACTICE.

APPENDIX (C).

Form of a Bill of Lading (*a*).

I. W. } SHIPPED by the grace of God in good order by
No. 1. a 20. } A. B. merchant, in and upon the good ship called the John and Jane, whereof C. D. is master, now riding at anchor in the river of Thames, and bound for Barcelona in Spain, 20 bales containing 100 pieces of broad-cloth marked as per margin; and are to be delivered in the like good order and condition at Barcelona aforesaid, (the act of God, the king's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation, of whatever nature and kind soever, excepted,) unto E. F. merchant there, or to his assigns (*b*), he or they paying for the said goods —— per piece freight, with primage and average accustomed. IN WITNESS whereof, the master (or purser) of the said ship hath affirmed to three bills of lading of this tenor and date, one of which bills being accomplished, the other two to stand void. And so God send the good ship to her destined port in safety.

DATED at London, the —— day of ——.

(*a*) Abb. Shipp. 215, (5th Ed.)

(*b*) In English bills of lading the words "or assigns" are always inserted; but it was held that a Spanish bill of lading, which does not contain such words, was similarly assignable by indorsement. *Renteria* v. *Ruding*, M. & Malk. 511; S. C. Lloyd & Welsby, Merc. Ca. 274, (where the question was as to the liability of the indorsee for freight.) See Abb. Shipp. 286.

APPENDIX (D).

Form of East India Warrant (a).

No. To the East India Company's warehouse-keeper, for private trade, Billiter Lane.

You are desired to deliver to A. B. or his assigns, by indorsement hereon, and the bearer giving a receipt on the back hereof, the following indigo: viz. [*then follows the description, price, weight, &c.*] Sold him by the united East India Company.

Treasury, East India House, this—— day of ——.

(Counter signature.) (Signature of the Company's treasurer or assistant.)

(a) 3 B. & Ad. 321, *Taylor* v. *Kymer*. It appears that these warrants are indorsed, usually in blank, by the persons therein named, and are afterwards transferred by delivery, or by indorsement and delivery.

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LONDON:
C. ROWORTH AND SONS, BELL YARD,
FLEET STREET.



